IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-863

F. BROWNE GREGG,

Petitioner,

versus

U.S. INDUSTRIES, INC., and
DIVERSACON INDUSTRIES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
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F. BROWNE GREGG,
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U.S. INDUSTRIES, INC., and
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, F. Browne Gregg, prays that a writ of certiorari be issued to review the judgment order of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 7, 1979.

CITATIONS TO OPINIONS BELOW

The Court of Appeals for the Third Circuit entered its "Judgment Order" on August 7, 1979 (App. B),*

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* Hereinafter, (App. ____) shall refer to the Appendices hereto.

which affirmed the "Final Order Pursuant to Mandate" entered by the District Court for the District of Delaware on October 20, 1978 (App. C), for the reasons set forth in the district court's opinion dated September 29, 1978 (App. D). None of these orders are reported. The court of appeals denied a Petition for Rehearing of its unreported August 7, 1979 judgment order on September 5, 1979 (App. A). The district court's opinion, dated September 29, 1978, pursuant to which those orders were entered, is reported at 457 F.Supp. 1293 (D.Del. 1978).

Three prior opinions have been issued by the district court in this case, dealing with issues not raised directly in this Petition. The first, dated September 28, 1972, is reported at 348 F.Supp. 1004 (D.Del. 1972) (App. H); the second, dated February 2, 1973, is reported at 58 F.R.D. 469 (D.Del. 1973) (App. G); and the third is an unreported Memorandum Opinion and Order, dated April 24, 1975 (App. F). The final judgment of the district court entered pursuant to those opinions was reversed by the court of appeals in an opinion dated July 19, 1976 and reported at 540 F.2d 142 (3d Cir. 1976) (App. E). This Court denied certiorari to review that decision of the court of appeals, 433 U.S. 908 (1977).

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1979. The order denying the Petition for Rehearing was entered on September 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the first litigant who obtains a decision holding state sequestration or attachment procedures constitutionally deficient for lack of jurisdiction over the litigant's property interest seized may be deprived of restoration of the full value of his property interest unconstitutionally seized and sold prior to final judgment by application of the principle that such constitutional decisions shall have prospective effect only.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States, which provide in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."
>
> Constitution of the United States, Amendment V.

> "No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."
>
> Constitution of the United States, Amendment XIV.

STATEMENT OF THE CASE

The Judgment Order of the court of appeals which petitioner seeks to have reviewed affirmed the district court's Final Order Pursuant to Mandate (App. C) entered to implement its opinion (App. D) reported at 457 F.Supp. 1293 (D.Del. 1978). The district court's order vacated a final judgment entered upon a default previously entered against petitioner Gregg, and dismissed the complaint of respondents U.S. Industries, Inc., and its wholly owned subsidiary Diversacon Industries, Inc.,* for want of personal jurisdiction over Gregg. The order also dismissed Gregg's motion seeking restitution of the full value of his property interest, which had been seized and sold, for failure to state a claim for which relief could be granted. The vacated final judgment was entered upon a Clerk's default when Gregg refused to submit to personal jurisdiction under the Delaware sequestration procedure by answering USI's complaint, and confirmed the sale of Gregg's property seized by USI under the Delaware sequestration procedure and sold under court order to satisfy one of USI's claims.

On June 19, 1972, USI had filed a motion seeking sequestration of Gregg's 68,210 shares of USI common and 8,750 shares of USI preferred stock (App. 8a) and, at an *ex parte* hearing held on that date, without notice to Gregg and without an opportunity for an adversary hearing, the Court of Chancery of Delaware

* Respondents U.S. Industries, Inc., and Diversacon Industries, Inc., will be referred to collectively as "USI."

entered its Order of Sequestration appointing a sequestrator and ordering him to seize and sequester Gregg's shares of USI stock. The sequestration order required plaintiffs to post a $1,000 bond, conditioned only that "plaintiffs shall abide with any order of this Court respecting the property herein ordered to be seized and sequestered." The $1,000 bond was posted by the plaintiffs and the sequestrator accomplished the seizure of Gregg's stock on June 19, 1972, which then had a market value of approximately $2,385,000, by issuing appropriate notices to USI, even though the stock certificates were in the possession of a bank in Florida to which Gregg had pledged them as security for a $1,635,000 loan.*

Shortly thereafter, Gregg removed this action to the federal district court in Delaware, appearing specially as permitted under the Delaware sequestration procedure, and sought to vacate the seizure and recover the stock interest so seized upon the grounds that the court had no jurisdiction over Gregg or his property and that such seizure under the sequestration procedure of Delaware was unconstitutional because it violated the Fifth and Fourteenth Amendments to the United States Constitution. After a number of hearings on the constitutional question, a default was entered against Gregg pursuant to Rule 55(a), Federal Rules of Civil Procedure, because Gregg failed to enter a personal appearance under the Delaware sequestration procedure and answer USI's

* Gregg's equity in the sequestered stock was approximately $750,000.

complaint on the merits (App. 12a).* Thereafter, pursuant to an order of the district court prior to the entry of final judgment (App. 13a), Gregg's interest in the sequestered stock was sold at public auction by the sequestrator and the net proceeds of such sale, amounting to approximately $19,000, were paid over to USI in partial satisfaction of one of its claims. After the sale, the district court entered a final judgment against Gregg and Gregg appealed to the Court of Appeals for the Third Circuit.

The court of appeals reversed the district court's judgment and became the first court anywhere to hold the application of the Delaware sequestration procedure to a litigant such as Gregg constitutionally deficient due to the absence of any contacts by Gregg USI or USI's underlying claims with Delaware. The court of appeals remanded the matter to the district court for dismissal of USI's complaint for lack of jurisdiction over Gregg (App. E).

Gregg then filed his motion in the district court for restitution of $751,731, the full value of his stock interest measured as of the date of seizure. (App. 15a). The district court entered its "Final Order Pursuant to Mandate," which required USI to pay over to Gregg the $18,930.60 net proceeds received by USI from the sale

* Prior to that time, the Florida bank had intervened in the action. Due to the decline in the market value of the USI stock, the district court permitted the bank to sell shares of Gregg's sequestered stock pursuant to its loan agreements. The bank eventually sold all but 1,200 shares of Gregg's preferred stock to satisfy its lien and pay its expenses (App. 10a-12a.)

of the stock plus interest and costs, and dismissed Gregg's motion for restitution of the full value of his stock interest as a matter of law upon the grounds that such motion "fail[ed] to state any claim for which relief can be granted" (App. 16a). No opportunity was afforded Gregg to have an evidentiary hearing in support of his motion for restitution.

The court of appeals, by judgment order, affirmed the final order of the district court "for the reasons set forth in the district court opinion" (App. B) and thereby approved the district court's ruling that even though Gregg had been the first party to overturn the Delaware sequestration procedure on constitutional grounds, nevertheless

> "[w]here the plaintiff[USI], even in a property seizure case, relies upon a statutory procedure which has not theretofore been declared unconstitutional and where the only claim of 'wrongfulness' of the plaintiff's attachment or other conduct in bringing the action is the unconstitutionality of that procedure, there can be no recovery of damages."
>
> (App. 19a.)

The district court and the court of appeals thereby held that although USI's complaint would be dismissed for lack of jurisdiction, the court, as a matter of law, would not order USI to restore to Gregg the full value

of his seized property interest, because the constitutional decision would not be given retroactive effect.

REASON FOR GRANTING THE WRIT

> Dismissal of petitioner's motion to order his adversary to restore to him the full value of his sequestered property interest, where petitioner was the first litigant to successfully challenge the constitutional validity of the Delaware sequestration procedure, effectively destroys the only meaningful incentive for civil litigants to challenge unconstitutional procedures — the opportunity to be made whole for the injury sustained through the application of an unconstitutional practice or procedure.

In its 1976 opinion reversing the default judgment entered against Gregg by the district court (App. E), the court of appeals had recognized that Gregg had no contacts with the State of Delaware, and that application to the situation of traditional notions of fair play and substantial justice, as required by *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), would not permit USI to invoke the jurisdiction of Delaware courts and seize Gregg's property in order to assert its claims against Gregg in Delaware.

By denying as a matter of law Gregg's application to be restored to the position he enjoyed before his property was seized in that unconstitutional procedure, the judgment of the court below has established a precedent which removes the incentive for litigants to challenge unconstitutional procedures. The successful challenge has provided Gregg only a Pyrrhic victory — the court of appeals has validated Gregg's contention that the state courts of Delaware (and the United States District Court exercising its diversity jurisdiction) were without jurisdiction over him, and that it was a denial of due process to subject him and his sequestered property interest to suit there — but the court has required Gregg to suffer the loss occasioned by the seizure of his property interest. Gregg has alleged that USI sequestered his property interests which had a value of $751,731.00* (App. 15a). Upon the dismissal of USI's complaint for want of jurisdiction over Gregg pursuant to the mandate of the court of appeals, USI offered, and the courts below have approved, the restitution by USI to Gregg of approximately $19,000.00, the amount received by USI after the judicial sale of Gregg's remaining stock, conducted pursuant to the district court's erroneous default judgment entered after Gregg refused to appear in Delaware and defend against USI's claims (App. 15a).

The successful litigant who establishes a substantive constitutional principle must be entitled, upon reversal of an erroneous judgment entered and executed against him, to be restored to that which he lost by reason of the erroneous judgment. *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry.*, 249 U.S. 134, 145 (1919);

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* The district court dismissed Gregg's motion for restitution for failure to state a claim, and therefore conducted no evidentiary hearing on Gregg's allegations (App. 16a).

Northwestern Fuel Co. v. *Brock*, 139 U.S. 216 (1891); *Morris's Cotton*, 75 U.S. (8 Wall.) 507 (1869). Otherwise, the only substantial motivation for a party to mount a substantive attack on an invalid and unconstitutional statutory scheme is destroyed, and the only result of a successful attack is the declaration of constitutional principles without regard to the enormity of the successful party's underlying financial injury.

This Court has recognized that parties in criminal cases who establish important constitutional principles are entitled to enjoy the benefit of establishing those principles, even though the Court decides to apply the decision prospectively, and denies the benefit of such constitutional decision to litigants in other pending cases. In *Stovall* v. *Denno*, 388 U.S. 293 (1967), this Court denied the application for a writ of habeas corpus made by a petitioner who had been convicted as the result of an allegedly tainted identification which would not have been permissible under the rules announced that same day in *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967). The Court in *Stovall* said:

> "We recognize that Wade and Gilbert are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. *That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum.* Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, *and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law,* militate against denying Wade and Gilbert the benefit of today's decisions." (Emphasis supplied.) (Footnotes omitted.) (388 U.S. 301.)

The judgment of the courts below that Gregg's motion for restitution of the value of his property interest unconstitutionally seized fails, as a matter of law, to state a claim for relief renders Gregg's successful attack upon the Delaware sequestration process mere dictum as to him, for it provides him no substantial relief.

The holdings in *Kacher* v. *Pittsburgh National Bank*, 545 F.2d 842, 846 (3d Cir. 1976), and *G. H. McShane Co.* v. *McFadden*, 554 F.2d 111, 113-14 (3d Cir.), *cert. denied*, 434 U.S. 857 (1977), relied upon by the courts below, are not applicable here. Both were damage actions brought under 42 U.S.C. §1983 in which the plaintiffs were denied recoveries for damages arising out of the attachment of their property. In neither case was the plaintiff the successful party who initially secured the decision holding the attachment procedure used by his adversary unconstitutional. In this case, Gregg was the first party to ever obtain a decision holding an application of the Delaware sequestration procedure unconstitutional. This is so, even though this Court ultimately denied certiorari t review the Third Circuit's

decision invalidating the sequestration of Gregg's property interest (433 U.S. 908) three days after deciding *Shaffer* v. *Heitner*, 433 U.S. 186 (1977). This Court characterized as "well reasoned" the decision of the Third Circuit when, in *Shaffer*, it reversed the decision of the Supreme Court of Delaware, which held that the Delaware sequestration procedure comported with federal due process principles. 433 U.S. at 204-05.

It has been the practice of this Court to apply newly announced constitutional principles to the litigant before it [*see, e.g., United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967)] unless severe disruption of governmental functions of the several states would result from application of the new principles to the litigants before the Court. *See, e.g., Allen* v. *State Board of Elections*, 393 U.S. 544 (1969) (declining to invalidate elections in which the procedures followed were not approved in the manner required by Section 5 of the 1965 Voting Rights Act), and *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969), and *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970) (declining to invalidate on equal protection grounds the elections held to approve state revenue bonds or general obligation bonds which excluded non-freeholders).

Indeed, this Court has held that the three-part test for determining whether a decision is retroactive, announced in *Stovall* v. *Denno*, 388 U.S. 293 (1967), and *Desist* v. *United States*, 394 U.S. 244 (1969), cannot be appropriately applied to cases in which the constitutional

question in issue goes to the power of a court to act at all. In *United States* v. *United States Coin and Currency*, 401 U.S. 715, 723 (1971), this Court applied retroactively the decisions in *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), which had held there could be no criminal conviction of gamblers who properly asserted their privilege against self incrimination as grounds for their failure to comply with the reporting requirements of the federal gambling tax law. *U.S. Coin and Currency* held that the government could not utilize violation of the unconstitutional reporting statute as a basis for a forfeiture proceeding. It was implicit in this holding that there had been no subject matter jurisdiction in the forfeiture court. *See also Robinson* v. *Neil*, 409 U.S. 505 (1973), which held the prior decision in *Waller* v. *Florida*, 397 U.S. 387 (1970), retroactive. *Waller* had held trials in both municipal and state courts for the same act barred by the Double Jeopardy Clause for lack of power in the second court to prosecute the defendant for actions which had already been the subject of a municipal trial. 397 U.S. at 390.

In view of this Court's willingness to give to other litigants full retroactive effect to decisions which announce substantive constitutional principles pertaining to the power of courts to entertain suits, *a fortiori*, it is not only proper but necessary to apply to a party such as Gregg, in the very case which first established that principle, the full pecuniary benefit of the ruling obtained by him that the courts of Delaware acquired no jurisdiction over his person or property by means of the Delaware sequestration procedure.

Not only does the decision below lead to the anomalous result that while the district court had no jurisdiction to entertain the action brought by respondent USI, Gregg is saddled with the heavy loss resulting from the exercise of that non-existent jurisdiction. The decision announces to civil litigants generally that successful attacks on unconstitutional practices will result only in abstract declarations of principles, and will preclude the successful litigant from enjoying the practical, economic benefit of any constitutional decision he might obtain.

CONCLUSION

For the reasons set forth above, this Court should issue a writ of certiorari to review the judgment order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2680

U.S. INDUSTRIES, INC., a Corporation, and
DIVERSACON INDUSTRIES, INC., a corporation

versus

F. BROWNE GREGG,
Appellant.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*.

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in

regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ R. J. ALDISERT
Judge

Dated: September 5, 1979

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2680

U.S. INDUSTRIES, INC., a corporation, and
DIVERSACON INDUSTRIES, INC., a corporation,

versus

F. BROWNE GREGG,
Appellant.

Appeal from the United States District Court
for the District of Delaware
(D.C. Civil No. 4431)

Argued
August 7, 1979
Before: ALDISERT, VAN DUSEN and
WEIS, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, and for the reasons set forth in the district court opinion by the Honorable Walter K. Stapleton, *U.S. Industries, Inc. v. Gregg,* 457 F.Supp. 1293 (D.Del. 1978); it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

/s/ R. J. ALDISERT
Circuit Judge

Attest:

/s/ THOMAS F. QUINN
Thomas F. Quinn, Clerk

DATED: AUG. 7, 1979

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 4431

U.S. INDUSTRIES, INC., a corporation, and
DIVERSACON INDUSTRIES, INC., a corporation,
Plaintiffs,

versus

F. BROWNE GREGG,
Defendant.

FINAL ORDER PURSUANT TO MANDATE

On this 20th day of October, 1978, it appearing that on July 6, 1977 the United States Circuit Court of Appeals for the Third Circuit issued its judgment in lieu of mandate, which reversed the judgment herein dated August 20, 1975, and remanded the cause with a direction to dismiss the Complaint for want of jurisdiction over the person of the defendant, F. Browne Gregg, and taxed costs against appellees in the amount of $618.00, and it further appearing that thereafter defendant Gregg filed a "Motion for Order Granting Restitution and Indemnification by Plaintiffs for Defendant's Property Loss and Expenses of Litigation Incurred By Reason of the Unlawful Seizure of

Defendant's Property", and that the issues raised by said motion were briefed and argued by the attorneys for the respective parties, and the Court having issued its written Opinion on said motion, dated September 29, 1978, it is for the reasons set forth in said Opinion,

ORDERED, ADJUDGED AND DECREED as follows:

1. The Order of Default Judgment of this Court entered herein August 20, 1975 is vacated, and the Complaint is dismissed for want of jurisdiction over the person of the defendant, F. Browne Gregg.

2. Defendant F. Browne Gregg is awarded judgment for restitution in the amount of $18,930.60, with interest at the rate of 6% per annum from August 20, 1975.

3. Defendant F. Browne Gregg is awarded judgment for costs in the amount of $1,810.84 consisting of $1,192.84 in costs and disbursements, including sequestrator's fee, previously taxed against defendant in this Court and $618.00 in costs taxed pursuant to the judgment in lieu of mandate of the United States Circuit Court of Appeals for the Third Circuit.

/s/ WALTER K. STAPLETON
United States District Judge

CONSENTED TO AS TO FORM:

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APPENDIX D

U.S. INDUSTRIES, INC., a corporation,
and Diversacon Industries, Inc., a corporation,
Plaintiffs,

versus

F. Browne GREGG,
Defendant.

Civ. A. No. 4431

United States District Court,
D. Delaware.

Sept. 29, 1978.

OPINION

STAPLETON, District Judge:

Presently before this Court is defendant F. Browne Gregg's "Motion for Order Granting Restitution and Indemnification by Plaintiffs for Defendant's Property Loss and Expenses of Litigation Incurred by Reason of the Unlawful Seizure of Defendant's Property" ("Motion for Restitution"). In order to understand the grounds for the motion, it is necessary to review the history of the case in some detail.[1]

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1 Earlier opinions in this case are reported at 540 F.2d 142 (3d Cir. 1976); 58 F.R.D. 469 (D.Del. 1973); and 348 F.Supp. 1004 (D.Del. 1972).

I. THE FACTUAL BACKGROUND

The present action was commenced on June 19, 1972, when plaintiffs, U.S. Industries, Inc., a Delaware corporation, and Diversacon Industries, Inc., a Florida corporation (hereinafter referred to collectively as "USI"),[2] filed a complaint against Gregg in the Delaware Court of Chancery. USI alleged primarily that Gregg, a Florida citizen, had acted fraudulently and in breach of his fiduciary duty in connection with certain agreements between Gregg and USI for the exchange of all of the capital stock of three Florida construction companies controlled by Gregg in return for shares of USI common and special preference stock, and for the employment of Gregg as an executive of the three companies. USI sought a personal judgment of over $20 million from Gregg. On the day the complaint was filed, USI also filed a motion pursuant to 10 Del.C. §366, seeking sequestration of the USI stock allegedly owned by Gregg, in an attempt to compel his appearance in the Court of Chancery. After an *ex parte* hearing, the Court of Chancery entered an Order of Sequestration appointing a sequestrator and directing him to seize Gregg's interest in 68,210 shares of USI common stock and 8,750 shares of USI special preference stock. The sequestrator accomplished the seizure of stock on June 19, 1972 by issuing notice to USI. Under the terms of the sequestration order, Gregg retained the power to sell the seized stock at any time,

2 Diversacon Industries, Inc., is a wholly-owned subsidiary of U.S. Industries, Inc.

provided that the proceeds of the sale would be held by the sequestrator in lieu of the original property or reinvested as directed by Gregg.[3]

The certificates evidencing the sequestered USI stock were in the possession of the First National Bank of Leesburg in Leesburg, Florida (hereinafter "Bank"). Prior to the filing of this action, Gregg had pledged and delivered the stock certificates to the Bank in order to secure the repayment of a loan of $1,635,000 from the Bank to Gregg. However, 8 Del.C. §169[4] provides that

3 Paragraph 4 of the Order of Sequestration provided as follows:

> 4. In the event that said defendant shall make a bona fide sale or sales of the property seized hereunder or any thereof and shall receive therefor not less than the market price at the time of sale thereof and shall deposit with the Sequestrator the proceeds of such sale or sales, the Sequestrator shall forthwith advise the Corporation of such facts and thereupon the property or part thereof sequestered and seized and so sold shall be released from such sequestration and seizure without further action of any kind by the Sequestrator or this Court, and in such event the proceeds of any such sale shall be held by the Sequestrator until further order of this Court in lieu of the property or part thereof initially seized and so sold; provided further that the proceeds of any such sale or sales shall be subject to investment and reinvestment by the Sequestrator in such property and upon such terms and conditions as said defendant may, from time to time, direct in writing, provided always that the property in which such proceeds are invested (as well as any uninvested proceeds of any sale of such property) shall be held by and in the name of the Sequestrator pursuant to the terms of this Order and until further order of this Court.

4 8 Del.C. §169. *Situs of ownership of stock.*

> For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State.

the situs of the stock of a Delaware corporation is Delaware, regardless of the actual physical location of the stock certificates.

On July 28, 1972, the Court of Chancery permitted the Bank to intervene in this action. Later that day, Gregg removed the action to this Court. On August 4, 1972, Gregg filed a motion to quash sequestration and to dismiss for lack of jurisdiction and/or to stay the proceedings. Gregg alleged that the Delaware sequestration procedure under which his stock had been seized violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment and that the Court lacked personal jurisdiction over Gregg. On August 11, 1972, in response to the Bank's application, this Court entered an order which amended the sequestration order of June 19, 1972, by allowing the sequestered stock to be transferred on the books of USI from Gregg's name to the name of the Bank or its nominee, as provided for in the prior loan documents between the Bank and Gregg.[5] On October 13, 1972, the Court denied Gregg's motion to quash sequestration and dismiss the action.[6] The Court held that it could exercise *quasi in rem* jurisdiction over the sequestered stock despite the sparsity of other contacts with Delaware, without violating the Due Process Clause. The Court further held that the sequestration procedure itself did not deny procedural due process. The Court denied Gregg's motion for certification of the issues to the Third Circuit pursuant to 28 U.S.C. §1292(b).

5 Gregg did not oppose that transfer.

6 *U.S. Industries v. Gregg*, 348 F.Supp. 1004 (D.Del. 1972).

Following its seizure on June 19, 1972, the market value of USI common stock began to decline. On October 13, 1972, the Court amended the sequestration order of June 19, 1972, in order to permit the Bank to transfer or sell, pursuant to the terms of the loan agreements between the Bank and Gregg, any or all of the shares of sequestered stock in satisfaction of Gregg's indebtedness to the Bank. The order required the Bank to file a notice and report on all such sales and to remit any excess net proceeds to the sequestrator. Pursuant to the Court's order, the Bank began to sell the stock to satisfy its lien. Between October 31, 1972, and February 22, 1973, the Bank notified the Court that it had sold 60,663 shares of common stock and 6,750 shares of special preference stock.

On October 26, 1972, Gregg filed a motion seeking leave to make a limited appearance to defend on the merits, with any liability on his part being limited to the value of his interest in the sequestered stock. The Court denied both Gregg's motion[7] and his request for certification of the issues under 28 U.S.C. §1292(b). On February 15, 1973, Gregg filed a notice of appeal and a petition for a writ of mandamus or prohibition in the Third Circuit Court of Appeals in an attempt to obtain review of this Court's Orders respecting its jurisdiction and the *in personam* character of the appearance required of him if he wished to defend. The Third Circuit dismissed Gregg's appeal on the ground that this Court's order was non-appealable, and denied the petition for a writ of mandamus or prohibition.

7 *U.S. Industries v. Gregg*, 58 F.R.D. 469 (D.Del. 1973).

On March 6, 1973, the Clerk of the Court entered a default against Gregg, pursuant to Fed.R.Civ.P. 55(a), on the ground that Gregg had failed to appear personally and file an answer within the time provided in the Court's Order of February 12, 1973. On April 4, 1973, an inquest was held at which plaintiff Diversacon Industries, Inc., presented proof to support its claim in Count 8 of the complaint for $400,000 owed by Gregg on a note which he and his wife had signed. On June 8, 1973, the Court ruled that the Bank was entitled to collect attorneys' fees from the proceeds of the sale of the stock, as compensation for fees and expenses which it had incurred in order to protect its interest in the stock in this action. On July 27, 1973, the Bank reported that it had sold 800 additional shares of the common stock. On November 15, 1973, the Court entered an order directing the Bank to sell an additional 6,747 shares of common stock and directing the sequestrator to sell the remaining 2,000 shares of special preference stock held by him. On December 5, 1973, the Bank reported that it had sold the 6,747 shares of common stock, and on December 28, 1973, the Bank reported that it had sold 800 shares of special preference stock. Following this sale, the Bank's lien and its expenses of litigation, including attorneys' fees, were fully satisfied, and the Bank forwarded to the sequestrator excess proceeds in the amount of $123.44.

On December 13, 1973, Gregg filed a notice of appeal from the Court's Order of November 15, 1973, ordering the sale of the sequestered stock. On January 16, 1974, the Court stayed the sale of the remaining 1,200

shares of special preference stock then held by the sequestrator. On May 17, 1974, the Third Circuit dismissed Gregg's appeal, without prejudice to his right to appeal after a final judgment had been entered. Following this action, Gregg filed two motions seeking rehearing on this Court's Orders declining to quash sequestration. The Court denied both of these motions.

On May 28, 1975, the Court ordered that the remaining shares of special preference stock be sold. The judicial sale was conducted on June 25, 1975, and an Order confirming the sale for the price of $20,000 was entered on July 7, 1975. On August 20, 1975, the Court entered an Order of Default Judgment requiring disbursement of the proceeds of the sale to the sequestrator and to plaintiff Diversacon Industries, Inc. The Court allowed a sequestrator's fee and disbursements in the amount of $1,192.84, and granted to plaintiff Diversacon Industries, Inc., judgment in the amount of $18,481.20 and costs in the amount of $449.40.[8] On September 10, 1975, Gregg filed a notice of appeal from the Final Judgment of this Court. On July 19, 1976, the Third Circuit Court of Appeals reversed the judgment of this Court,[9] holding that the Delaware situs statute, 8 Del.C. §169, as construed by the Delaware courts and as applied in this sequestration proceeding, did not comport with the constitutional requirement that

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8 Therefore, all of the $20,123.44 held by the sequestrator was disbursed to the sequestrator and the plaintiff, Diversacon.

9 *U.S. Industries v. Gregg*, 540 F.2d 142 (3d Cir. 1976), *cert. denied*, 433 U.S. 908, 97 S.Ct. 2972, 53 L.Ed.2d 1091 (1977).

jurisdiction be predicated on minimum contacts with the forum, citing *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

Following the reversal by the Third Circuit, USI filed a petition for writ of certiorari in the United States Supreme Court. On June 24, 1977, the Supreme Court held in *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977), that Delaware's assertion of jurisdiction based on the sequestration of a defendant's stock having a statutorily conferred situs in Delaware was inconsistent with the constitutional "minimum contacts" requirement expressed in *International Shoe, supra*. In so doing, the Supreme Court overruled its prior decisions in *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878), and *Harris v. Balk*, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1905). *Shaffer, supra*, 433 U.S. at 212, n. 39, 97 S.Ct. 2569. Three days later, USI's petition for a writ of certiorari in the present case was denied.[10] On July 6, 1977, the Third Circuit issued a judgment and mandate to this Court "with a direction to dismiss the complaint for want of jurisdiction over the person, in accordance with the opinion of this Court". Following the Third Circuit's mandate, Gregg filed this Motion for Restitution.

In his motion, Gregg claims that he is entitled to recover not only the benefits actually conferred upon USI as a result of the proceedings in this case, but also to receive the value of his interest in the stock seized at the

10 *U.S. Industries v. Gregg*, 433 U.S. 908, 97 S.Ct. 2972, 53 L.Ed.2d 1091 (1977).

time of the seizure, with interest from that date.[11] He calculates the value of that interest to be $751,731.[12] Gregg also asserts that USI must reimburse him for expenses which he has incurred in having the sequestration order vacated, including costs and attorneys' fees.

In opposing this motion, USI argues that it is responsible to Gregg only for restitution of the benefits which it actually received as a result of the judgment in this case. USI has offered to pay Gregg the sum of $18,-481.20 which Diversacon Industries, Inc. received in satisfaction of the default judgment, the sum of $449.40 awarded to Diversacon as costs, and the sum

11 The Third Circuit stated that Gregg had "at least two identifiable interests in the pledged stock: (a) an equitable interest in the amount by which the stock value exceeded the debt, and (b) an absolute right to discharge the bank's lien upon payment of the debt." 540 F.2d at 146. Gregg looks to the first of these interests as the measure of his recovery.

12 Gregg calculates the value of the USI stock at the time of sequestration as follows: At the close of trading on the New York Stock Exchange on June 19, 1972, USI common stock was selling for 23⅛. (Wall Street Journal, June 20, 1972, p. 37). Accordingly, the 68,210 shares of common stock had a market value on the date of the seizure of $1,577,356.20. The 8,750 shares of special preference stock, although containing a conversion ratio to USI common stock of 3⅛ shares of common for each share of special preference, had a value in excess of this conversion ratio. (See Affidavit of Sanford Kaynor, dated July 27, 1972. The sales of the special preference stock by the First National Bank of Leesburg reveal that the special preference stock sold at all private sales reported to this Court for a price equal to at least four or more times the current market price of the common stock). Using a minimum conversion factor of four times the common stock price of 23⅛ on June 19, 1972, the special preference stock had a value of $809,375 on that date. The combined value of the common and special preference stock on June 19, 1972 was $2,386,731.

From this total value, Gregg has subtracted $1,635,000, the amount of the Bank's lien on the stock, leaving his interest at $751,731.

of $1,192.84 covering the sequestrator's fees and disbursements, along with interest from the date of this Court's final judgment, August 29, 1975.[13]

I conclude that Gregg is entitled to restitution of the benefits conferred on USI, together with costs, as USI concedes, but that Gregg's application otherwise fails to state any claim for which relief can be granted.[14]

II. RESTITUTION

Gregg urges that he is entitled to the return of the value of his property interest in the sequestered stock at the time of seizure largely on the authority of a line of cases which have permitted "restitution" to parties adversely affected by an erroneous court order.[15] While there is some language in these cases to support Gregg's position, I have found no case in which a plaintiff, following reversal of an erroneous injunction, judgment, attachment, or other decree has received in restitution an amount greater than the value of the

13 In addition, plaintiffs agree that they must pay Gregg the $618 in costs which he incurred in connection with his appeal to the Third Circuit.

14 I assume, without deciding, that if defendant were entitled to more than restitution of the benefits conferred upon USI, he could secure that relief in this action without having to file an independent suit.

15 *See, Northwestern Fuel Co. v. Brock*, 139 U.S. 216, 11 S.Ct. 523, 35 L.Ed. 151 (1891); *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 39 S.Ct. 237, 63 L.Ed. 517 (1919); *Ex Parte Lincoln Gas & Electric Light Co.*, 256 U.S. 512, 41 S.Ct. 558, 65 L.Ed. 1066 (1921); *Baltimore & Ohio R.R. Co. v. United States*, 279 U.S. 781, 49 S.Ct. 492, 73 L.Ed. 954 (1929); *In re Imperial "400" National, Inc.*, 456 F.2d 926, 929 (3d Cir. 1972); *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 225-29, 242-44 (8th Cir. 1970).

benefit which had been conferred upon his opponent as a result of the erroneous order.

The best reconciliation of the case law cited is that restitution in these situations is based upon a theory of unjust enrichment. This is the position which the Third Circuit has taken. *In re Imperial "400" National, Inc.*, 456 F.2d 926, 929, n. 3 (3d Cir. 1972). This theory clearly supports Gregg's claim that he is entitled to the return of the amount actually paid to USI from the proceeds of the sale of the sequestered stock, with interest from the date of the order of default judgment.[16] This is the amount by which USI was unjustly enriched as a result of this Court's erroneous entry of a default judgment. However, to the extent that Gregg demands restitution of what he lost in the decline of the market value of his stock as a result of the erroneous orders of this Court, without regard to the benefit which USI received, the cases do not support his position.[17]

Most courts have treated claims for recovery beyond the value of the benefit conferred by an erroneous order as damages claims, and have held them to be

16 USI does not dispute this.

17 Gregg also cites Federal Rules of Civil Procedure 81(b) and 83 as possible sources of authority for this Court to grant the relief he seeks. Rule 81(b) abolishes the writs of scire facias and mandamus, but permits equivalent relief to be obtained by appropriate action or motion. Rule 83 provides in part: "In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." However, these rules may not be construed so as to extend the jurisdiction of this Court. *See* Federal Rule of Civil Procedure 82. Furthermore, they may be applied only in accordance with principles of substantive law.

subject to a different set of legal principles than those applicable to claims for restitution.[18] There is, of course, good reason to distinguish between such damage claims and restitution claims based upon unjust enrichment. An unjust enrichment claim presents only the issue of whether a party should be able to retain a windfall. A claim for damages, on the other hand, may present the much more difficult issue of how a loss should be apportioned between parties, neither of whom has benefitted from, or been "at fault" with respect to the transaction giving rise to the loss.

Before a court will award damages which have resulted from a reversed judgment, there is usually a requirement that there be proof of malice or lack of probable cause in instituting the action on the part of the plaintiff.[19] Where there is a court-ordered seizure of property, some states require proof of malice or lack of probable cause before there may be a recovery of damages. *Weber v. Vernon*, 2 Pennewill 359, 45 A. 537 (Del.Super. 1899), suggests that in a wrongful attachment case, a showing of malice or lack of probable cause may be required under Delaware law.

18 *See, e.g., Tenth Ward Road Dist. No. 11 v. Texas & P. Ry. Co.*, 12 F.2d 245 (5th Cir. 1926); *Monolith Portland Midwest Co. v. Reconstruction Finance Corp.*, 128 F.Supp. 824, 878 (S.D.Cal. 1955), *vacated on other grounds*, 240 F.2d 444 (9th Cir. 1957); *Greenwood County v. Duke Power Co.*, 107 F.2d 484 (4th Cir. 1939); *cert. denied*, 309 U.S. 667, 60 S.Ct. 608, 84 L.Ed. 1014 (1940); *United Motors Service v. Tropic-Aire*, 57 F.2d 479 (8th Cir. 1932); *Kansas City Southern Ry. Co. v. Southern Trust Co.*, 279 F. 801 (8th Cir. 1922); *Hartford-Empire Co. v. Shawkee Mfg. Co.*, 163 F.2d 474 (3rd Cir. 1947); *Chain O'Mines, Inc. v. United Gilpin Corp.*, 131 F.2d 824 (7th Cir. 1942).

19 *See Tenth Ward Road Dist. No. 11 v. Texas & P. Ry. Co., supra; Monolith Portland Midwest Co. v. Reconstruction Finance Corp., supra; Greenwood County v. Duke Power Co., supra.*

It is unnecessary to pursue this general line of authority, however, for the rule appears to be nearly universal that where a plaintiff, even in a property seizure case, relies upon a statutory procedure which has not theretofore been declared unconstitutional and where the only claim of "wrongfulness" of the plaintiff's attachment or other conduct in bringing the action is the unconstitutionality of that procedure, there can be no recovery of damages.

At the time when USI invoked the Delaware sequestration procedure as a method of obtaining jurisdiction over Gregg and at the time of the eventual recovery, no court had held that procedure to be unconstitutional. Even following USI's invocation of the procedure, both this Court and the Delaware courts held that the procedure met constitutional standards.[20] *See, U.S. Industries v. Gregg*, 348 F.Supp. 1004 (D.Del. 1972); *Greyhound Corp. v. Heitner*, 361 A.2d 225 (Del. 1976); *Wiley v. Copeland*, 349 A.2d 211 (Del. 1975); *Gordon v. Michel*, 297 A.2d 420 (Del.Ch. 1972). In July of 1976, over four years after USI had instituted this action and moved for an order of sequestration, the Third Circuit concluded that the use of that procedure in order to obtain jurisdiction was unconstitutional. *U.S. Industries v. Gregg*, 540 F.2d 142 (3d Cir. 1976).

20 There are many cases holding that a party should not be held liable for errors of the court. *See, e.g., Greenwood County v. Duke Power Co., supra; United Motors Service v. Tropic-Aire, supra; Kansas City Southern Ry. v. Southern Trust Co., supra.*

The Delaware rule is that a plaintiff will not be held civilly liable for reliance upon a statutory procedure in a property seizure case, where that statute has not yet been declared unconstitutional. In *Downs v. Jacobs*, 272 A.2d 706 (Del.Sup.Ct. 1970), an action for damages for distraint of rent under an allegedly unconstitutional law, the court stated, at 708:

> . . . we hold that the tenant may not recover damages from the landlord or the constable for a good faith reliance upon the Landlord Distress Law, even though the Law may be subsequently declared unconstitutional and invalid.

The federal rule in this Circuit is the same as that in Delaware. The Third Circuit has held that litigants are justified in their reliance upon state attachment procedures until such procedures are specifically overturned, even when a Supreme Court decision has rendered their constitutionality questionable. *G. H. McShane Co., Inc. v. McFadden*, 554 F.2d 111 (3d Cir.), *cert. denied*, 434 U.S. 857, 98 S.Ct. 178, 54 L.Ed.2d 129 (1977); *Kacher v. Pittsburgh National Bank*, 545 F.2d 842 (3d Cir. 1976).[21]

In *McShane*, the plaintiff had invoked Pennsylvania's foreign attachment procedures. Subsequently, the Third Circuit invalidated those procedures in *Jonnet v.*

21 The Second and Tenth Circuits have reached the same conclusion. *Tucker v. Maher*, 497 F.2d 1309 (2d Cir. 1974); *Rios v. Cessna Finance Corporation*, 488 F.2d 25 (10th Cir. 1973).

Dollar Savings Bank of City of New York, 530 F.2d 1123 (3d Cir. 1976). Several days later, the *McShane* trial court enjoined any further attachment. The owner of the property which had been seized then attempted to revive his counterclaim for damages resulting from the attachment. The Third Circuit held that even if the ruling in *Jonnet* had been foreshadowed by *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), decided two years before McShane filed his action, McShane could not be held liable for damages. Under *Kacher*, any other result would work an injustice on those plaintiffs "who acted in accordance with a time honored and court tested proceeding." 545 F.2d at 846. The court in *McShane* concluded that the *Jonnet* holding could not be applied retroactively in order to secure damages from a plaintiff who had acted under a "presumptively constitutional scheme." In *Kacher*, the Third Circuit reached a similar result in an action for damages resulting from the invocation of a Pennsylvania replevin statute subsequently held to be unconstitutional.

Gregg argues that none of the cases cited are applicable to this set of facts. He attempts to distinguish *McShane* on the ground that the defendant there was requesting retroactive application of a constitutional decision. He claims that since he brought the first successful challenge to the Delaware sequestration procedure, he is entitled to "the fruits of his successful challenge." However, this purported distinction does not render the rule of *Kacher* and *McShane* in-

applicable. In this case, as in those two cases, the plaintiff had invoked the procedure prior to the time when it was held to be unconstitutional. As the *McShane* court said, there is no . . .

> . . . right to recover damages from an individual who followed a statutory scheme that had not yet been held unconstitutional when so utilized.

554 F.2d at 114. The holdings of *Kacher* and *McShane* are sufficiently broad to cover the present situation.

Application of the Delaware and Third Circuit rule is particularly fitting with this set of facts. As noted above, USI was relying upon a procedure for the sequestration of stock of a Delaware corporation which had been created by the General Assembly and which had been repeatedly upheld as constitutional by the courts. In addition, the form of the sequestration order submitted by USI to the Chancery Court attempted to provide Gregg with adequate protection against depreciation of the value of the seized stock by allowing Gregg to sell the seized stock and deposit the proceeds of the sale with the sequestrator.[22] This Court upheld the validity of the procedure followed by USI, and at the time when all of the seized stock had been sold, that

22 Gregg's control over the sale of the stock is a key factor which differentiates the present case from *Cantor v. Sachs*, 18 Del.Ch. 359, 162 A. 73 (1932) upon which Gregg relies so heavily. *See, TWA, Inc. v. Hughes Tool Co.*, 41 Del.Ch. 11, 187 A.2d 350 (Del.Ch. 1962), *affirmed sub. nom. Breech v. Hughes Tool Co.*, 41 Del.Ch. 128, 189 A.2d 428 (Del.Sup. 1963).

procedure had not yet been judicially determined to be unconstitutional by any court. Finally, as noted above, when the sequestration procedure, as applied in this case, was ultimately invalidated by the Supreme Court, the Court acted upon a theory which required the overruling of two landmark United States Supreme Court cases. *See, Shaffner v. Heitner*, 433 U.S. 186, 212, n. 39, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977).

Thus, it is difficult to find fault with USI's conduct. To be sure, it is also difficult to find fault with Gregg's conduct. However, if there was any way in which the loss could have been avoided, it would have been through action by Gregg. Gregg contends that as a practical matter he could not have sold the sequestered stock, even though authorized to do so by the sequestration order. He claims that, had he directed the sale of the stock, a substantial federal income tax liability would have been incurred and that, without access to the proceeds of the sale, he would not have been able to meet that obligation. The affidavit filed in support of this motion, however, is the first indication to the Court, or so far as the record shows, to USI that such a problem existed. If the problem had been brought to the attention of the Court, it is inconceivable to me that some relief would not have been granted either by way of a modified sequestration order or an increased bond.[23] Indeed, even if out of an abundance of caution,

23 In *Sargent v. Fuller*, 132 Pa. 127, 19 A. 34 (1890), the Pennsylvania Supreme Court said: If the plaintiff's stock has depreciated, it is her misfortune. The defendant did nothing to produce such result. It was not taken out of her possession. Nor can it be truly said the attachment prevented its being sold. Upon a proper application to the court below we have little doubt an order would have been made for its sale, the proceeds to await the result of the attachment.
19 A. at 35.

Gregg had decided not to approach the Court for fear of entering a general appearance,[24] he should, in fairness, have informed USI of his inability to pay the taxes other than from the proceeds of the sale and of his intention to look to USI for any subsequent decline in the value of the stock. If USI had been so notified, it could have reevaluated its position and made an informed decision as to whether it wished to assume that risk or to offer to authorize the sequestrator, in the event of a sale, to release sufficient funds to pay the taxes. But a rule which would permit recovery of market loss, in the absence of such a notice, would give the benefit of any market gains to the owner of sequestered property while requiring the plaintiff to insure him against any market loss. Equity does not favor the creation of such a rule.

Gregg also argues that he is entitled to damages for the loss in value of the sequestered stock because the sequestration procedure violated procedural due process, citing *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974), and *Jonnet v. Dollar Savings Bank of the City of New York*, 530 F.2d 1123 (3d Cir. 1976). Neither of those cases is on point because the practical effect of the sequestration order signed in this case was not to deprive Gregg of the possession or control of his stock, but only to impose a lien upon it, which would not impair the sale but would pass to the proceeds of such a sale. *See, Sager v. Burgess*, 350 F.Supp. 1310 (E.D. Pa. 1972), *summarily affirmed*, 411 U.S. 941, 93 S.Ct.

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24 Gregg's counsel made numerous communications and arguments to the Court during the course of this case, none of which were held to constitute personal appearances. Had the Court been notified of Gregg's situation, it could have considered the matter on its own motion.

1923, 36 L.Ed.2d 406 (1973); *Winpenny v. Krotow*, 574 F.2d 176 (3d Cir. 1978). But it is unnecessary to rule on this constitutional issue. Even if the sequestration procedure utilized did violate procedural due process, as Gregg maintains, that does not strengthen his case. When invoked, that procedure had never been declared unconstitutional on those grounds, and *McShane* and *Kacher, supra*, accordingly, remain a bar to recovery.

Gregg's motion for restitution, except to the extent earlier noted, will be denied.

III. ATTORNEYS' FEES.

Gregg also claims that he is entitled to recover the attorneys' fees which he has incurred in defending this action. In the federal courts, the general rule is that the prevailing party is not entitled to recover attorneys' fees. *See, Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). However, a federal court sitting in diversity, as this one is, should follow state law regarding the grant of attorneys' fees. *Alyeska, supra*, 421 U.S. at 259, n. 31, 95 S.Ct. 1612.

Under Delaware law, the general rule is also that a prevailing party may not recover attorneys' fees as part of costs. *See, e.g., Walsh v. Hotel Corp. of America*, 231 A.2d 458 (Del. 1967); *Mencher v. Sachs*, 39 Del.Ch. 366, 164 A.2d 320 (Del. 1960); *Maurer v. International Re-Insurance Corp.*, 33 Del.Ch. 456, 95 A.2d 827 (Del. 1953); *Wilmington Trust Co. v. Coulter*, 208 A.2d 677 (Del.Ch. 1965).

The Delaware case law upon which Gregg relies in contending that this situation is an exception to the general rule suggests that attorneys' fees expended for a "victorious attack" upon an attachment may be recoverable from the attacking party as "costs" covered by the bond prescribed by the attachment statute[25] or perhaps as "court costs." *E.g., Walsh v. Hotel Corporation of America, supra; Moffat Tunnell Improvement Dist. v. United States Fidelity & Guaranty Co.*, 7 W.W.Harr. 473, 37 Del. 473, 185 A. 186 (Del.Super.Ct. 1936); *Town of Seaford v. Eastern Shore Public Serv. Co.*, 2 Terry 438, 41 Del. 438, 24 A.2d 436 (Del.Super.Ct. 1942). The suggestions in the Delaware case law, however, were made in the context of situations in which the plaintiff had been found to have violated or misapplied the authorizing statute and a seizure had been dissolved for what are termed "defects in the process." I believe that the Supreme Court of Delaware, if faced with the situation before me, would find *Downs v. Jacobs, supra*, rather than the defective process cases, to be the controlling precedent. The policy there stated in the context of another statute authorizing prejudgment seizure, would appear to be the overriding concern under Delaware law:

> . . . Citizens . . . have a right to accept the law as it is written until it is repealed or judicially condemned. They are not required to speculate upon the validity of a statute or to act

25 Plaintiff's bond in this case contains only the condition that "plaintiffs shall abide with any order of this Court respecting the property herein ordered to be seized and sequestered." Gregg does not contend that USI violated that condition.

> under it at their peril. Until legislatively or judicially excised, a statute is an operative fact. Courts presume every legislative act constitutional and indulge every intendment in favor of validity. No penalty may be visited upon citizens for doing likewise. . . .

272 A.2d at 707.

Gregg's motion for attorneys' fees will be denied.

IV. CONCLUSION.

In accordance with the mandate of the Third Circuit, the complaint in this case must be dismissed for want of jurisdiction. In addition, the default judgment will be vacated. Gregg will receive restitution from Diversacon in the amount of $18,930.60, with interest from the date of the judgment. As the prevailing party, Gregg will be awarded costs, including the amount of the sequestrator's fees. All further claims for restitution and attorneys' fees will be denied.

Submit order.

APPENDIX E

U.S. INDUSTRIES, INC., a corporation, and
Diversacon Industries, Inc., a corporation,

versus

F. Browne GREGG, Appellant.

No. 75-2177

United States Court of Appeals,
Third Circuit.

Argued April 20, 1976.

Decided July 19, 1976.

OPINION OF THE COURT

ALDISERT, Circuit Judge.

Unlike 49 other states that enacted the Uniform Commercial Code, Delaware did not enact §8-317(1)[1] which requires the actual seizure of stock certificates to effect a valid attachment or levy upon an interest in corporate stock. Rather, Delaware continued in force

1 §8-317. *Attachment or Levy Upon Security.*

(1) No attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy but a security which has been surrendered to the issuer may be attached or levied upon at the source.

§169[2] of its General Corporation Law which provides that the situs of ownership of stock in a Delaware corporation is Delaware — regardless of the actual location of the stock certificates. In contrast to the Uniform Commercial Code procedure, Delaware nonresident sequestration[3] practice permits the "seizure" of a

2 8 Del.C. §169. *Situs of ownership of stock.*

For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State (8 Del.C. 1953, §169; 56 Del.Laws, c. 50.)

3 10 Del.C. §366. *Compelling appearance of non-resident defendant.*

(a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a non-resident of the State, the Court may make an order directing such non-resident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such nonresident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for three consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

(b) The Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof, the release of such property from seizure and for the sale of the prop-

defendant's stock interest in a domestic corporation merely by giving notice to the corporation in Delaware. Seizure having been effected, Delaware case law establishes that the defendant may not appear specially to protect the seized property without subjecting himself to full *in personam* liability. *Sands v. Lefcourt Realty Corp.*, 35 Del.Ch. 340, 117 A.2d 365 (1955). The major question presented in this appeal from a default judgment approving the sale of defendant's interest in the shares of a Delaware corporation is whether the Delaware situs statute, as construed by the Delaware courts and as applied in this sequestration proceeding, comports with the constitutional requirement that jurisdiction be predicated on minimum contacts with the forum. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). In our view, it does not so comport. Accordingly, we reverse and remand with a direction to dismiss for want of jurisdiction over the person.

I.

The issue is sharply drawn in this litigation initiated

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erty so seized, and may require the plaintiff to give approved security to abide any order of the Court respecting the property.

(c) Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchaser in accordance with law. (Code 1852, §1938; 17 Del. Laws, c. 215; Code 1915, §3850; 34 Del. Laws, c. 216, §2; 35 Del. Laws, c. 217; 36 Del. Laws, c. 268, §1; Code 1935, §4374; 10 Del.C. 1953, §366; 50 Del. Laws, c. 379, §1.)

by U.S. Industries, Inc. (USI), a Delaware corporation having its principal place of business in New York, and its wholly-owned subsidiary, Diversacon Industries, Inc., a Florida corporation having its principal place of business in Florida. The sole defendant is F. Browne Gregg, a Florida citizen and resident. In 1969 Gregg and USI entered into an agreement in Florida for the sale of three Florida construction companies controlled by Gregg. In essence, USI agreed to exchange USI voting common and special preference stock for the outstanding stock of the Gregg companies, the business of those companies to be transferred to USI's subsidiary, Diversacon. In addition to transferring the stock and business of his corporations, Gregg contributed $1 million to the capital of the transferred corporations and, with his wife, gave a $500,000 installment note to Diversacon. In return, Gregg received 100,962 shares of USI common stock and 8,750 shares of USI special preference stock; he was to receive additional common stock if Diversacon achieved specified levels of profitability in the future. Gregg also received an employment contract to serve as president of the transferred businesses until 1973. Gregg was removed as president in 1971 following disagreements about the operations and profitability of the acquired companies. In 1972, USI (and Diversacon as a nominal plaintiff) filed an eight-count complaint against Gregg in Delaware Chancery Court claiming damages in excess of $20 million in connection with the sale.

To obtain jurisdiction over Gregg, a non-resident, plaintiffs moved *ex parte* for an order of seques-

tration under 10 Del.C. §366 to seize Gregg's property in Delaware. His only property in Delaware consisted of the USI shares he had obtained in exchange for his Florida businesses. Though physically the certificates were in the First National Bank of Leesburg, Florida, where Gregg had pledged them as security for a loan, appellee contends the shares were property in Delaware because of USI's Delaware incorporation and the situs rule of 8 Del.C. §169. Plaintiffs filed a bond in the sum of $1,000 and the state court issued the order of sequestration, the sequestrator seizing the shares by formally notifying USI of the order. The First National Bank of Leesburg then moved to intervene and quash the sequestration claiming that it owned the whole of the interest in the shares by virtue of the pledge and that Gregg had no interest to sequester. At this point, and before further action by the Delaware court, Gregg removed the case to federal court based upon diversity and $10,000 in controversy.

The proceedings in the district court were not cursory: Gregg removed the action in July, 1972, and final judgment was ordered in August, 1975. For present purposes, however, we need not trace the intricate history of the litigation below.[4] Gregg raised objections to the sequestration which were rejected, and he sought interlocutory review which was denied. Knowing he would be subject to *in personam* liability if he answered the complaint, *Sands v. Lefcourt Realty Corp., supra,* Gregg

4 Decisions of the district court are reported at 348 F.Supp. 1004 (D.Del. 1972) and 58 F.R.D. 469 (D.Del. 1973).

did not answer. Issues concerning damages, valuation of the stock, and the prior lien of the bank were resolved. Eventually, Gregg's stock was sold in satisfaction of the *quasi in rem* judgment of default entered against him. He appeals from the default judgment, raising four issues:

1. Whether a nonresident defendant has a sequestrable interest in Delaware corporate stock where the negotiable stock certificates have been pledged and delivered by him to a bank located outside Delaware and the defendant holds only a contingent right to the return of the certificates if and when the loan is paid in full?

2. Whether the seizure of Gregg's stock to compel his personal appearance to answer damage claims unrelated to Delaware and unrelated to his rights in the stock deprived him of due process because of the absence of minimum contacts with Delaware to sustain jurisdiction? *Hanson v. Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

3. Whether the Delaware procedure for seizure of Gregg's stock without a pre-seizure adversary hearing deprived him of due process and equal protection rights? *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); *Mitchell v. W. T. Grant Co.,* 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d

406 (1974); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).

4. Whether the denial of an opportunity to make a limited appearance, defending plaintiff's claim on the merits with any judgment limited to the value of the seized property, deprived Gregg of due process?

II.

We turn first to the non-constitutional argument. The district court found, and we agree:

> The sequestration order was served upon USI on or about June 19, 1972. The stock was then registered in the name of Gregg. As of July 27, 1972, the collateral was valued by the Bank at $2,066,333.62.

The loan transaction was negotiated and closed in Florida. The law of Florida determines the nature and extent of Gregg's interest, if any, in the stock. The law of Delaware controls the question of whether any such interest may be sequestered under 10 Del.C. §366. *Cheff v. Athlone Industries, Inc.*, 233 A.2d 170 (Del.Sup.Ct. 1967); *Nickson v. Filtrol Corporation*, 265 A.2d 425 (Del.Ch. 1970).

An examination of Florida law reveals that Gregg had not transferred his entire interest in the stock to the Bank at the time of sequestration. The rights retained under Article 9 of Florida's Uniform Commer-

cial Code by a debtor who has conveyed a security interest in collateral apply "whether title to collateral is in the secured party or in the debtor." 19C Fla.Stat.Ann. §679.9-202 (West 1966). These rights include the right of return of the collateral upon fulfillment of the debtor's obligations. *Id.* §679.9-506. This right is expressly recognized in the Gregg note; it is, in any event, unwaivable. *Id.* §679.9-501.

The rights reserved to the debtor under Article 9 are rights in the collateral itself and may be transferred voluntarily or involuntarily. *Id.* §679.9-311 provides:

> "The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default."

348 F.Supp. 1004, 1016 (D.Del. 1972) (footnote omitted).

Having decided that Florida law determines the nature of Gregg's interest in the securities pledged to the bank, and having decided further that under Florida law Gregg had not transferred his entire interest in the stock at the time of the sequestration, the question is whether Delaware law would permit the sequestra-

tion of Gregg's interest. The district court found that Delaware law would so permit. We agree.

Our starting point is 10 Del.C. §366 which provides that the "Court may compel the appearance of the defendant by the seizure of all or any part of his property." The word "property" has been construed by Delaware courts as having a "broad and comprehensive meaning, including legal and equitable interests in both real and personal property." *Blumenthal v. Blumenthal*, 28 Del.Ch. 1, 35 A.2d 831, 836 (Ch. 1944), *aff'd* 28 Del.Ch. 448, 59 A.2d 216 (Sup.Ct. 1945); *Sands v. Lefcourt Realty Corp., supra*. That an interest is contingent does not make it nonsequestrable. *Weinress v. Bland*, 31 Del.Ch. 269, 71 A.2d 59 (Ch. 1950).

The district court concluded that the bank merely had a security interest in Gregg's USI stock — valued at over $2 million at the time of seizure — securing a demand note of $1.5 million. Gregg had at least two identifiable interests in the pledged stock: (a) an equitable interest in the amount by which the stock value exceeded the debt, and (b) an absolute right to discharge the bank's lien upon payment of the debt.

We agree with the district court's summary:

> . . . Delaware courts, confronted with questions of whether interests in stock were sequestrable, have asked whether the specified interest was cognizable at law or equity, whether it was susceptible of sufficient identification to permit seizure, and whether it was saleable. *Blumenthal v. Blumenthal, supra; Greene v. Johnston*, 34 Del.Ch. 115, 99 A.2d 627 (Sup.Ct. 1953). Here Gregg's interest is so cognizable, so identifiable ard so alienable. Accordingly, I conclude that it is sequestrable.

348 F.Supp. at 1017.

The Delaware cases urged upon us by Gregg do not fault the reasoning of the district court nor dilute the soundness of its conclusion. Four of these were cases where an effort was made to seize property held by a legal entity in which the defendant had some interest. *Winitz v. Kline*, 288 A.2d 456 (Del.Ch. 1971) (voting trust); *Nickson v. Filtrol Corp.*, 265 A.2d 425 (Del.Ch. 1970) (trust); *Cheff v. Athlone Industries, Inc.*, 233 A.2d 170 (Del.Sup.Ct. 1967) (estate); *Beuchner v. Farbenfabriken Bayer Aktiengesellschaft*, 38 Del.Ch. 490, 154 A.2d 684 (Sup.Ct. 1959) (subsidiary corporation). Seizure was denied in all cases, the Delaware courts having regard for the separate existence of the legal entity and the rights of its creditors and beneficiaries not involved in the litigation. The fifth case, *K-M Auto Supply, Inc. v. Reno*, 236 A.2d 706 (Del.Sup.Ct. 1967), involved an attempt to attach a client's funds held by an attorney in escrow for a third party, and attachment was vacated on the ground that the client-defendant no longer had an attachable interest. We see only the most remote

factual parallels between these cases and the case *sub judice*, and we perceive fundamental legal distinctions. Having in mind particularly that the interest of the third-party bank here was fully protected, we discern no reason why these cases require the conclusion that Gregg had no sequestrable interest.

We are satisfied that under Florida law Gregg had not relinquished his entire interest in the shares and that under Delaware law he possessed sequestrable "property" within the meaning of §366.

III.

We turn now to the first of Gregg's constitutional arguments: that there are no minimum contacts with Delaware upon which to predicate jurisdiction in that state. USI and Diversacon have no contacts with Delaware except for USI's incorporation in the state. The transactions giving rise to the litigation did not take place in Delaware. Gregg is not a Delaware resident, he conducts no business in that state, and he owns no property physically located there. His only contact arises by virtue of the provision of 8 Del.C. §169 that the situs of his USI shares is Delaware. This is the *sole* nexus upon which Delaware can predicate its jurisdiction to adjudicate Gregg's rights and this, Gregg argues, is too fragile a connection to satisfy constitutional requirements.

Gregg relies upon the Supreme Court's classic formulations of the constitutional limits to state court jurisdiction.

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice," *Milliken v. Meyer*, 311 U.S. 457, 463 [61 S.Ct. 339, 85 L.Ed. 278].
>
> * * * * *
>
> Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.

International Shoe Co. v. Washington, 326 U.S. 310, 316, 319, 66 S.Ct. 154, 158, 160, 90 L.Ed. 95 (1945).

> [Restrictions on the personal jurisdiction of state courts] are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State

> that are a prerequisite to its exercise of power over him.

Hanson v. Denckla, 357 U.S. 235, 251, 78 S.Ct. 1228, 1238, 2 L.Ed.2d 1283 (1951).

To resolve the jurisdictional question presented, we must determine (a) whether the constitutional strictures of *International Shoe* and its progeny apply to jurisdiction denominated *quasi in rem* and (b) if they do, whether the statutory situs of 8 Del.C. §169, alone, is a sufficient minimum contact to support the jurisdiction here exercised.

A.

The Delaware Supreme Court recently had occasion to consider the problem in *Greyhound Corp. v. Heitner*, 361 A.2d 225 (Del.Sup.Ct. 1976), *appeal filed sub nom. Shaffer v. Heitner*, 44 U.S.L.W. 3739 (June 22, 1976) (No. 75-1812). In upholding the constitutionality of the Delaware sequestration procedure, the Delaware Supreme Court swiftly disposed of the contention that minimum contacts were lacking where jurisdiction was based on the statutory situs rule of §169:

> There are significant constitutional questions at issue here but we say at once that we do not deem the rule of *International Shoe* to be one of them. An argument based on that case was made in *Breech v. Hughes Tool Company*, 41 Del.Ch. 128, 189 A.2d 428 (1963), and re-

> jected by this Court. Compare *Hibou, Inc. v. Ramsing*, Del.Super., 324 A.2d 777 (1974). We are not persuaded that *Breech* should now be abandoned. The reason, of course, is that jurisdiction under §366 remains, as it was in 1963, *quasi in rem* founded on the presence of capital stock here, not on prior contact by defendants with this forum. Under 8 Del.C. §169 the "situs of the ownership of the capital stock of all corporations existing under the laws of this State . . . [is] in this State", and that provides the initial basis for jurisdiction. Delaware may constitutionally establish situs of such shares here, *Rogers v. Guaranty Trust Co. of New York*, 288 U.S. 123, 53 S.Ct. 295, 77 L.Ed. 652 (1932); *Jellenik v. Huron Copper Min. Co.*, 177 U.S. 1, 20 S.Ct. 559, 44 L.Ed. 647 (1900), it has done so and the presence thereof provides the foundation for §366 in this case. Cf. *Breech v. Hughes Tool Company*, supra. On this issue we agree with the analysis made and the conclusion reached by Judge Stapleton in *U.S. Industries, Inc. v. Gregg*, D.Del., 348 F.Supp. 1004 (1972).

361 A.2d at 229 (footnote omitted)

Concerning a possible constitutional problem in the application of §169 to shareholders whose certificates are located outside of Delaware, the Delaware Supreme Court was similarly curt in its rejection of the argument:

Defendants argue also that the sequestration procedure is unconstitutional as applied to the interests of security holders whose certificates are located outside the State. They say that the certificates for the seized shares are physically outside Delaware and that the statutory attempt under 8 Del.C. §169 to reserve the situs of shares here is "to indulge in a fiction."

The argument is based largely, if not exclusively, on the right of a bona fide purchaser who acquires a certificate and, so far as we are informed, there is no such purchaser among defendants. As to these defendants, we have already determined that the shares have a situs here, *Rogers v. Guaranty Trust Co. of New York*, supra; *Jellenik v. Huron Copper Min. Co.*, supra; *U.S. Industries, Inc. v. Gregg*, supra; compare *Breech v. Hughes Tool Company*, supra, and, for present purposes that is conclusive on this contention.

Ibid. at 236.

Because the Delaware Supreme Court accepted the rationale and conclusion of the district court, we set forth the district court's four-paragraph treatment of this subject *in toto:*

> Gregg's first argument is based upon *International Shoe v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and its progeny. He asserts that "under modern concepts of due process, a court cannot assert jurisdiction

> unless either the defendant or the subject matter of the action had at least minimal contacts with the forum."
>
> The "mineral contacts" doctrine to which Gregg refers is not applicable where, as here, the plaintiff invokes the *quasi in rem* jurisdiction of the court. While a contrary view has been urged as the wiser one,[17] the courts have

17 See e.g., Ehrenzweig, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Non Conveniens, 65 Yale L.Rev. 289 (1956); Carrington, The Modern Utility of Quasi In Rem Jurisdiction, 76 Harv.L.Rev. 303 (1962). These commentators, however, recognize the prevailing view.

> accepted the view of Justice Holmes that the "foundation of jurisdiction is physical power."[18] Just as a court may exercise *in per-*

18 *McDonald v. Mabee*, 243 U.S. 90, 91, 37 S.Ct. 343, 61 L.Ed. 608 (1915). See also Goodrich, Conflicts of Law, §73 (1965).

> *sonam* jurisdiction in a suit on a transitory cause of action where the only contact with the forum state is personal service upon the defendant within that state[19] so also may a

19 E.g., *Fauntleroy v. Lum*, 210 U.S. 230, 28 S.Ct. 641, 52 L.Ed. 1039 (1908); Restatement, Conflicts of Laws, §§77, 78; Goodrich, Conflict of Laws, §73 (1964).

> court exercise jurisdiction over property within its control regardless of the presence or absence of other contacts with the forum state.[20]

20 *Cf. Hanson v. Denckla*, 357 U.S. 235, 246, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1957); Beal, Conflicts of Laws, §§106.3, 107.3 (1935); Goodrich, Conflicts of Law, §70 (4th Ed. Scoles 1964).

> Where the court has either of these foundations for the exercise of its power, it may con-

stitutionally proceed, though the absence of substantial contacts with the forum may lead it to decline to do so under the familiar principles underlying the doctrine of *forum non conveniens*[21] and the federal transfer provisions of 28 U.S.C. §1404.

21 E.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947); *General Foods Corp. v. CryoMaid, Inc.*, 41 Del.Ch. 474, 198 A.2d 681 (Del.Sup.Ct. 1964). The cases relied upon by Gregg arise because of the difficulty of applying traditional concepts of *in personam* jurisdiction over individuals in suits against foreign corporations. Even in such cases if the corporation's activities in a state are substantial enough it is ordinarily subject to suit there on causes of action unrelated to the business conducted in the forum state. See e.g., Restatement (Second) Conflict of Laws §47 (1971).

The state of a corporation's domicile may constitutionally provide, as Delaware has done, that the situs of its capital stock is in its home state.[22] Thus, where the stock of a domestic corporation is brought before the court, this provides a sufficient basis for the exercise of its *quasi in rem* jurisdiction even though the defendant may be a non-resident who has had no prior contacts with the forum state. *Breech v. Hughes Tool Co.*, 41 Del.Ch. 128, 189 A.2d 428 (Del.Sup.Ct. 1963); *Ownbey v. Morgan*, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837 (1920).[23]

22 *Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 53 S.Ct. 295, 77 L.Ed. 652 (1932); *Jellenik v. Huron Copper Mining Co.*, 177 U.S. 1, 20 S.Ct. 559, 44 L.Ed. 647 (1899).

23 [Incorporates note 26]:
Although neither the Delaware court nor the United States Supreme Court considered it significant, the *Ownbey* case appears to have been a suit by non-resident plaintiffs against a non-resident defendant arising out of the latter's activities as general manager of a Delaware corporation the activities of which were limited to the States of Colorado and New Mexico. *Morgan v. Ownbey*, 29 Del. 379, 6 Boyce 379, 100 A. 411 (1916).

Gregg attempts to distinguish the relevant authorities by saying that this is not in reality a *quasi in rem* action. He correctly points out that an avowed purpose of Delaware's sequestration statute is to compel a general appearance and thereby produce a basis for *in personam* jurisdiction. While the statute is concededly designed to produce this result, it does not follow that the action is not governed by the rules applicable to *quasi in rem* jurisdiction. Unless and until the non-resident defendant elects to enter a general appearance, the power of the court is limited to the application of the property before the court to the plaintiff's claim.[24]

24 10 Del.C. §366; *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *cf. Jacobs v. Tenney*, 316 F.Supp. 151 (D.Del. 1970); Restatement of Judgments, §34 comment f (1942).

348 F.Supp. 1004, 1019-20 (D.Del. 1972).

We are persuaded that the cryptic conclusions of the Delaware Supreme Court and the district court cannot survive detailed critical analysis.

B.

The Delaware Supreme Court and the district court relied on four cases: *Rogers v. Guaranty Trust Co.*, 288 U.S.

123, 53 S.Ct. 295, 77 L.Ed. 652 (1932); *Ownbey v. Morgan*, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837 (1921); *Jellenik v. Huron Copper Mining Co.*, 177 U.S. 1, 20 S.Ct. 559, 44 L.Ed. 647 (1899); *Breech v. Hughes Tool Co.*, 189 A.2d 428 (Del.Sup.Ct. 1963). For reasons we will explain, we believe that reliance on these cases was misplaced.

As a preliminary matter, the three Supreme Court cases relied on to dispose of the *International Shoe* contentions were all decided before *International Shoe*. Their precedential vitality, therefore, to rebut a minimum contacts argument would seem dubious at best. But our uneasiness with these precedents goes further. *Jellenik* was not a constitutional law case at all; it involved only the construction of a federal statute which allowed a federal trial court to bring before it absent, nonresident defendants in an action to remove encumbrances upon title to personal property "within the district where such suit is brought". Justice Harlan wrote that the "question to be determined on this appeal is, whether the stock in question is personal property within the district in which the suit was brought." And he answered the question as follows:

> Whether the stock is in Michigan so as to authorize that state to subject it to taxation as against individual shareholders domiciled in another state is a question not presented in this cause, and we express no opinion upon it. But we are of opinion that it is within Michigan for the purposes of a suit brought there

> against the company — such shareholders being made parties to the suit — to determine whether the stock is rightfully held by them. The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicile of the company is and must be in the state that created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is, whenever it is sought by suit to determine who is its real owner.

177 U.S. at 13, 20 S.Ct. at 563. Clearly, the opinion was carefully directed to the narrow statutory issue presented — whether the stock was within the district for purposes of a pure *in rem* action to determine ownership — and did not pretend to adjudicate constitutional questions or announce a constitutional rule.

Similarly, *Rogers v. Guaranty Trust Co.* was not a constitutional law case. *Rogers* was an action brought in New York state court seeking cancellation of certain shares in a New Jersey corporation authorized to do and doing business in New York as well as in New Jersey. No question of constitutional limits to jurisdiction was adjudicated. The Court made clear that *both* states were in a position to exercise jurisdiction, but directed the New York federal court to decline to exercise juris-

diction on the basis of the discretionary "settled doctrine that a court — state or federal — sitting in one state will, as a general rule, decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another state but will leave controversies as to such matters to the courts of the state of the domicile." 288 U.S. at 130, 53 S.Ct. at 297.

Finding no constitutional dimension to *Jellenik* or *Rogers*, we must disapprove reliance upon them as authority for rejecting the constitutional challenge here presented. The use of these cases as constitutional authorities is a classic example of illicit precedential inbreeding. The illegitimate conception apparently took place in *Breech v. Hughes Tool Co.* — the keystone of the *Greyhound* opinion on this issue. At issue in *Breech*, as here, was a federal constitutional challenge to the Delaware stock seizure practice. As here, plaintiff argued that there were no minimum contacts to justify *quasi in rem* jurisdiction. The Delaware Supreme Court met the argument thus: "This argument is interesting, but is clearly unsound under settled principles of law." 189 A.2d at 431. The settled principles of law consisted of the Delaware statutes, *Jellenik* and *Rogers*. The court's entire discussion on the issue is set forth in the margin.[5] The inbreeding continued in the

5 *Second.* Breech raises a constitutional question. He argues in effect that his Ford Motor Company stock has no situs in Delaware justifying the seizure. Since it is intangible property, it has a situs only by legal fiction; therefore the selection of a situs for intangibles must be one that embodies a "common sense appraisal of

the requirements of justice and convenience in particular conditions." Per Cardozo, J., in *Severnoe Securities Corp. v. London & Lancashire Ins. Co.*, 255 N.Y. 120, 123-124, 174 N.E. 299, 300. Breech analogizes this test to the federal test respecting the subjection of a foreign corporation to the jurisdiction of a state, i.e. a test based on "minimum contacts" with the state of the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 158, 90 L.Ed. 95.

Breech insists that if such a test be applied here, Delaware has no jurisdiction to seize his stock. There are no sufficient "contacts", he says, between the seized shares and the claim asserted by Toolco to justify *quasi in rem* jurisdiction. Hence the seizure should be vacated.

This argument is interesting, but is clearly unsound under settled principles of law. The seized shares have a Delaware situs because the Ford Motor Company is a Delaware corporation and the corporation law to which it owes its existence provides expressly that the situs of ownership of stock of all such corporations, for "all purposes of title, action, attachment, garnishment and jurisdiction of all courts in this State" shall be regarded as in this State. 8 Del.C. §169.

In *Jellenik v. Huron Copper Mining Co.*, 177 U.S. 1, 20 S.Ct. 559, 44 L.Ed. 647, the Supreme Court of the United States upheld the right of the State of Michigan to determine ownership of shares of stock of a Michigan corporation. The court quoted the provisions of the Michigan statute, including provisions for attachment of the stock, and said:

"The authority of the state to establish such regulations in reference to the stock of a corporation organized and existing under its laws cannot be doubted." 20 S.Ct. 563.

And see *Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 53 S.Ct. 295, 298, 77 L.Ed. 652.

The attachment of stock of Delaware corporations, without seizure of the certificate representing the shares, upon the theory that the stock has a statutory situs here, has existed since at least 1852 (Code,§1253). The "situs" section cited above (§169), stems from the corporation law of 1899. 21 Del.L. c. 273, §128. These statutes thus embody a settled Delaware policy, and the court may not overturn it on the basis of a suggested federal rule that has never been announced.

The weakness of Breech's contention is exposed by his concession that the attachment of Hughes' stock in "Toolco" was legal "because of the intimate relationship between the stock and cause of action alleged by plaintiff TWA." We have considerable diffi-

district court, reliance being had on the precedent of *Breech* as well as *Jellenik* and *Rogers*. Finally, in *Greyhound*, the Delaware Supreme Court was in a position to state that it was "not persuaded that *Breech* should be abandoned," citing a line of cases: *Jellenik*, *Rogers*, and the district court opinion in this action. We cannot accept the notion that the mere proliferation of unwarranted reliances on old cases suffices to settle a contemporary issue in a dynamic field of law.

C.

Like *Jellenik*, *Rogers*, and *Breech*, *Ownbey v. Morgan*, the fourth case, does not dictate the outcome of this litigation. *Ownbey*, however, deserves separate consideration. Challenged in *Ownbey*, and sustained by the Supreme Court, was a former Delaware statutory requirement that a defendant put up a "special bail" in a foreign attachment suit in order to be allowed to appear and defend on the merits. Ownbey was unable to put up the bail and a default judgment was entered against him. The *Ownbey* Court apparently rested its decision on a theory of implied consent as well as on the historical and customary validity of the practice in issue:

> [A] property owner who absents himself from the territorial jurisdiction of a state, leaving

culty in following this distinction. The primary purpose of the seizure is to compel appearance in a law suit, and to this purpose neither the nature of the property seized nor its incidental connection with the law suit seems material.

We are of opinion that the seizure was a constitutional exercise of power.

189 A.2d at 430-31.

> his property within it, must be deemed *ex necessitate* to consent that the state may subject such property to judicial process to answer demands made against him in his absence, according to any practicable method that reasonably may be adopted. A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the States as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law, even if it be taken with its ancient incident of requiring security from a defendant who after seizure of his property comes within the jurisdiction and seeks to interpose a defense.

256 U.S. at 111, 41 S.Ct. at 438.

We recognize that there is disagreement about the continued vitality of *Ownbey* as measured by contemporary standards. In relying on the historical validity of the practice, *Ownbey* ignored the fact that state procedures had no due process significance prior to the 1868 adoption of the Fourteenth Amendment. Moreover, the Supreme Court, more recently, has tartly reminded that "[t]he fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms." *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340, 89 S.Ct. 1820, 1822, 23 L.Ed.2d 349 (1960). Judge Gibbons has concluded that "[i]t is inconceivable that *Ownbey* would be decided today as it was decided in 1921."

Jonnet v. Dollar Savings Bank, 530 F.2d 1123, 1136 (3d Cir. 1976).

It is contended, however, that *Ownbey* survives with full vigor because it has been recently cited by the Supreme Court. The contention merits analysis. In *Fuentes v. Shevin*, 407 U.S. 67, 91, 92 S.Ct. 1983, 1999, 32 L.Ed.2d 556 (1972), the Supreme Court cited *Ownbey* to support this statement:

> Only in a few limited situations has this Court allowed outright seizure[23] without opportunity for a prior hearing.

23 Of course, outright seizure of property is not the only kind of deprivation that must be preceded by a prior hearing. See, *e.g., Sniadach v. Family Finance Corp., supra.* In three cases, the Court has allowed the attachment of property without a prior hearing. In one, the attachment was necessary to protect the public against the same sort of immediate harm involved in the seizure cases — a bank failure. *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29 [48 S.Ct. 422, 72 L.Ed. 768]. Another case involved attachment necessary to secure jurisdiction in state court — clearly a most basic and important public interest. *Ownbey v. Morgan*, 256 U.S. 94 [41 S.Ct. 433, 65 L.Ed. 837]. It is much less clear what interests were involved in the third case, decided with an unexplicated *per curiam* opinion simply citing *Coffin Bros.* and *Ownbey*. *McKay v. McInnes*, 279 U.S. 820 [49 S.Ct. 344, 73 L.Ed. 975]. As far as essential procedural due process doctrine goes, *McKay* cannot stand for any more than was established in the *Coffin Bros.* and *Ownbey* cases on which it relied completely. See *Sniadach v. Family Finance Corp., supra*, [395 U.S.] at 340 [89 S.Ct. 1820]; *id.*, at 344 [89 S.Ct. 1820] (Harlan, J., concurring).

Two years later, *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 613-14, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1972), mentioned *Ownbey* in the context of determining whether the petitioner in the case was entitled to a hearing before seizure. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416

U.S. 663, 679 n. 13, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974), cited *Ownbey* in a discussion of considerations that justify postponement of notice and hearing until after seizure. Similarly, in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 610, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975), *Ownbey* was cited as an instance where the Court had "approved prejudgment attachment liens."

Our review of these cases convinces us that, at the most, *Ownbey* has been cited by the Supreme Court from 1972 to 1975 to illustrate that few limited situations in which the Court historically has permitted seizure of property without opportunity for a prior hearing. Whether the case retains vitality for more than that seems here a moot issue. The brute fact is that *Ownbey* adjudicated the constitutionality of a statutory procedure since abandoned. While the case, incidentally, did involve the seizure of stock, it did not adjudicate the question of *situs;* and certainly it did not anticipate the minimum contacts doctrine of *International Shoe.*[6] *Ownbey* did, however, rely in part on the ancient distinction between actions *quasi in rem* and ac-

6 In *Fuentes*, the Supreme Court mentioned *Ownbey* as involving an attachment "necessary to secure jurisdiction." It is worth remembering that *Ownbey* was decided before *International Shoe* stimulated the enactment of long arm statutes. When *Ownbey* was decided, attachment was often necessary to secure jurisdiction *(quasi in rem)* over a nonresident defendant; today, at least if there are minimum contacts, full *in personam* jurisdiction can usually be obtained under a long arm statute. Arguably, then, the need to secure jurisdiction that justified *Ownbey* is now fully met by long arm jurisdiction, and could no longer serve to support the harsh result in that case.

tions *in personam* — the distinction which formed the major premise of the Delaware Supreme Court's truncated analysis in *Greyhound Corp. v. Heitner, supra.* We turn now to an analysis of that distinction in the context of this case.

IV.

We begin our inquiry into the constitutional dimensions of *quasi in rem* jurisdiction by conceding that the minimum contacts language of *International Shoe* was expressly made applicable to the exercise of jurisdiction *in personam.* Subsequent cases, however, have made it clear that ancient labels do not control the content of constitutional guarantees. Referring to the distinction between *in rem, quasi in rem,* and *in personam* actions, *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 312, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950), emphasized that "the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state." Later, *Hanson v. Denckla,* 357 U.S. 235, 246, 78 S.Ct. 1228, 1235, 2 L.Ed.2d 1283 (1958), articulated the constitutional requirement in terms of *affiliating circumstances*[7] "without which the courts of a State may not enter a judgment imposing obligations on persons

7 Apparently the phrase was suggested by Professor E. R. Sunderland. See Sunderland, *The Problem of Jurisdiction,* 4 Texas L.Rev. 429 (1936), reprinted in Selected Essays on Constitutional Law, Book 3, 1270, 1272 (1938).

(jurisdiction *in personam*) or affecting interests in property (jurisdiction *in rem* or *quasi in rem*)."

Hanson involved, *inter alia,* an attempt by Florida to exercise jurisdiction over trust assets in Delaware based upon the fact that the settlor-decedent had established a Florida domicil after executing the trust. Having made clear in a footnote that it was using *"in rem"* in lieu of *"in rem* and *quasi in rem,"* 357 U.S. at 246 n. 12, 78 S.Ct. at 1235, the Court had this to say generally about such jurisdiction:

> Founded on physical power, *McDonald v. Mabee,* 243 U.S. 90, 91, [37 S.Ct. 343, 61 L.Ed. 608], the *in rem* jurisdiction of a state court is limited by the extent of its power and by the coordinate authority of sister States. The basis of jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State. *Rose v. Himely,* 4 Cranch 241, 277 [2 L.Ed. 608]; *Overby v. Gordon,* 177 U.S. 214, 221-222 [20 S.Ct. 603, 44 L.Ed. 741]. Tangible property poses no problem for the application of this rule but the situs of intangibles is often a matter of controversy.

357 U.S. at 246-47, 78 S.Ct. at 1236 (footnote omitted). Finding it essential to scrutinize the affiliations that might justify Florida's exercise of jurisdiction, the Court concluded: "For the purpose of jurisdiction *in rem* the maxim that personalty has its situs at the domicil of

its owner is a fiction of limited utility. *Green v. Van Buskirk*, 7 Wall. 139, 150 [19 L.Ed. 109]. The maxim is no less suspect when the domicil is that of a decedent. . . . The fact that the owner is or was domiciled within the forum State is not a sufficient affiliation with the property upon which to base jurisdiction *in rem*." 357 U.S. at 249, 78 S.Ct. at 1237.

We can only understand *Mullane* and *Hanson* as establishing a constitutional limit to state court jurisdiction wholly independent of the label — *in rem, quasi in rem,* or *in personam* — that may be affixed to that jurisdiction. And whether it be called affiliating circumstances or minimum contacts,[8] we must assume that ultimately the test of *International Shoe* is determinative: that there be sufficient connection with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " 326 U.S. at 316, 66 S.Ct. at 158.

Judge Gibbons calls the problem here the "bifurcation of *International Shoe's* jurisdictional doctrine." *Jonnet v. Dollar Savings Bank*, 530 F.2d 1123, 1132 (3d Cir. 1976). He has placed the matter in proper perspective, chronologically and jurisprudentially:

> The analytical point of departure for those cases which have sustained against jurisdictional challenge foreign attachment pro-

8 In *Hanson*, the Supreme Court used the phrases interchangeably, evidently attributing the same constitutional content to both. See 357 U.S. at 250, 251, 78 S.Ct. 1228.

cedures has traditionally been a quartet of Supreme Court cases reviewing judgments of state courts: *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1877); *Harris v. Balk*, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1905); *Pennington v. Fourth National Bank*, 243 U.S. 269, 37 S.Ct. 282, 61 L.Ed. 713 (1917); *Ownbey v. Morgan*, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837 (1921). See, e.g., *Steele v. G. D. Searle & Co.*, 483 F.2d 339 (5th Cir. 1973), *cert. denied*, 415 U.S. 958, 94 S.Ct. 1486, 39 L.Ed.2d 572 (1974). All of these cases were decided before the Supreme Court in *International Shoe* redefined the due process limitations upon the exercise of judicial power over disputes foreign to the forum. All were decided before the Supreme Court in the escheat cases recognized that there are due process limitations upon the power of a state which has permitted a corporation chartered by it to do business, issue securities and incur debts beyond its borders to insist upon the fiction of a local situs for its securities and debts. *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71, 82 S.Ct. 199, 7 L.Ed.2d 139 (1961); *Texas v. New Jersey*, 379 U.S. 674, 85 S.Ct. 626, 13 L.Ed.2d 596 (1964), 380 U.S. 518, 85 S.Ct. 1136, 14 L.Ed.2d 49 (1965). No Supreme Court case has actually considered the due process issues tendered by this appeal, since the constitutional interpretations which raise them had not yet been made at the time either

Pennoyer v. Neff or *Ownbey v. Morgan* was decided.

530 F.2d at 1131-32. Judge Gibbons' analysis, a scholarly, carefully documented history of *quasi in rem* foreign attachment in the federal courts, develops a thesis to which we perceive no effective rebuttal. "Although it can be argued," he concludes, "that the content of constitutional process due a litigant defending title to property will vary from that due a litigant defending himself from liability in personam, there is no reason to believe that the Supreme Court presently recognizes such a distinction. . . . In short, the same limitations of fundamental fairness apply to any exercise by the state of judicial powers, whether that exercise be denominated in rem, quasi in rem or in personam. One of those limitations . . . is the *International Shoe* rule." *Ibid.* at 1136-37. We agree.

Our conclusion that *International Shoe* applies to *quasi in rem* actions is contrary to the district court's statement that "[t]he 'minimal contacts' doctrine to which Gregg refers is not applicable where, as here, the plaintiff invokes the *quasi in rem* jurisdiction of the court." 348 F.Supp. at 1020. Our conclusion also severely erodes the foundation of the Delaware Supreme Court's truncated analysis in *Greyhound Corp.* that *International Shoe* did not apply because "jurisdiction under §366 remains, as it was in 1963, *quasi in rem* founded on the presence of capital stock here." 361 A.2d at 229. Far from ending the constitutional inquiry, we believe that the *quasi in rem* character of the jurisdiction constitutes the analytical beginning point for the application of constitutional precepts to the case.

V.

We must decide whether the single fact of statutory situs of stock under 8 Del.C. §169 suffices to give Delaware sufficient contact or affiliation with this litigation to satisfy constitutional standards. In our view, it does not.

We do not exaggerate in saying that §169 is the single affiliation with Delaware in this case. The cause of action did not arise in Delaware. The defendant is not a citizen or resident of Delaware; he conducts no business in the state and owns no property physically located there. His sole contact is his interest in shares of USI represented by certificates located in Florida. The plaintiffs' connections with Delaware — insofar as that may be relevant[9] — are similarly sparse. Diversacon has no connection whatsoever; it is a Florida corporation having its principal place of business in Florida. USI is incorporated in Delaware but has its principal place of business in New York; it owns no property[10] and

9 It can plausibly be argued that a plaintiff's contacts with the forum are irrelevant for jurisdictional purposes. *Jonnet v. Dollar Savings Bank, supra,* 530 F.2d at 1141 (Gibbons, J., concurring). *Contra, Farrell v. Piedmont Aviation, Inc., infra.* We need not reach the issue, however, because here the plaintiffs' contacts with the forum are insufficient even assuming their relevance.

10 The absence of plaintiffs' assets in the state distinguishes this case from *Baker v. Gotz,* 492 F.2d 1238 (3d Cir. 1974) (in banc), *aff'g mem. by an equally divided court* 336 F.Supp. 197 (D.Del. 1971), *cert. denied,* 417 U.S. 955, 94 S.Ct. 3084, 41 L.Ed.2d 674 (1974), In *Baker,* the plaintiff railroad corporation, although a Pennsylvania corporation, did business and had substantial assets in Delaware.

maintains no business establishments in Delaware other than a registered agent's office as required by statute.

Because even the *plaintiffs* here cannot with reason be characterized as residents of Delaware, *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1968), *aff'd on rehearing in banc*, 410 F.2d 117, *cert. denied*, 396 U.S. 844, 90 S.Ct. 69, 24 L.Ed.2d 94 (1969), provides no precedential support for sustaining jurisdiction here. In *Minichiello*, the majority seemed to uphold the constitutionality of *Seider v. Roth*, 17 N.Y.2d 111, 269 N.Y.S.2d 99, 216 N.E.2d 312 (1966), on the basis that the *Seider* procedure (a judicially created direct action against liability insurance carriers) would be available only for New York resident plaintiffs or plaintiffs injured in New York. The limitation to New York residents was affirmed in *Farrell v. Piedmont Aviation, Inc.*, 411 F.2d 812 (2d Cir.), *cert. denied*, 396 U.S. 840, 90 S.Ct. 103, 24 L.Ed.2d 91 (1969), Judge Friendly observing that "the constitutional doubt with respect to applying *Seider v. Roth* in favor of non-residents would be exceedingly serious" and that the "doubt arises from New York's lack of meaningful contact with the claim." *Ibid.* at 817. In *Farrell*, the formality of appointing a New York administrator of a nonresident decedent's estate did not supply the necessary meaningful contact with New York. As in *Farrell*, it would seem that the plaintiffs' contacts with the forum here are more formal than meaningful, at least in constitutional terms.

Indeed, it is difficult to imagine how litigation implicating a Delaware corporation could have fewer or less meaningful contacts with the state. The brute fact is that USI's Delaware incorporation is the only genuine contact this litigation has with Delaware. It is our view that, under these circumstances, the fictional §169 situs of stock in Delaware does not pass constitutional muster as a predicate for jurisdiction in an action admittedly seeking to obtain personal liability of a nonresident in connection with transactions unrelated to the forum.

Again, we are impressed by Judge Gibbons' analysis:

> As a metaphysical exercise it may be asserted that since the very existence of the corporations is dependent upon state law, state law should be regarded as supreme in defining the situs of intangibles resulting from such corporate existence. But the state has permitted the corporations to stray far from its boundaries, and to issue intangibles without its jurisdiction. New Jersey once contended that since it issued a corporation's charter, it could determine the situs of intangibles in an in rem proceeding. The Supreme Court rejected this contention in *Texas v. New Jersey, supra.* Justice Black's opinion recognized that a local contacts analysis suggested by *International Shoe* and *Mullane v. Central Hanover Bank & Trust Co.* would be unworkable in

> escheat cases, because more than one jurisdiction might have contacts minimally sufficient to support the exercise of adjudicatory authority over the dispute. Nevertheless, he rejected the fictionalized situs approach, announcing instead a rule favoring the state of the last known address of the creditor. There is no more justification for recognizing state notions of fictionalized situs of corporate intangibles in a *quasi-in-rem* case than in an escheat case. Indeed, the state's interest in a fictionalized local situs is stronger in the escheat case, where it is at least acting in its own interest rather on behalf of a private litigant.

Jonnet, supra, 530 F.2d at 1139.

Considering the factors that might properly qualify as affiliating circumstances to support jurisdiction, *Hanson v. Denckla, supra,* gave short shrift to the proposition that the situs of personalty is the owner's domicil: "For the purpose of jurisdiction in rem the maxim that personalty has its situs at the domicil of its owner is a fiction of limited utility." 357 U.S. at 249, 78 S.Ct. at 1237. We see no more jurisdictional[11] utility to the fiction that the corporation's domicil — the state of incorporation — is the situs of its stock. In *Texas v. New Jersey,*

11 We readily concede that the law of the state of incorporation might be a critical, even controlling, factor for choice of law purposes. But questions of constitutional jurisdiction we believe are wholly different from choice of law issues.

379 U.S. 674, 85 S.Ct. 626, 13 L.Ed.2d 596 (1965), New Jersey argued that the state of incorporation of a debtor corporation ought to have the power to escheat an abandoned debt. Justice Black answered: "[I]t seems to us that in deciding a question which should be determined primarily on principles of fairness, it would too greatly exalt a minor factor to permit escheat of obligations incurred all over the country by the State in which the debtor happened to incorporate itself." *Ibid.* at 680, 85 S.Ct. at 630. Here too we apply "principles of fairness and see no reason to "exalt a minor factor."

While the focus of our attention has been the situs provision of §169, the result we reach is buttressed by the operation in this case of the rule of *Sands v. Lefcourt Realty Corp., supra.* Under the interpretation that case gave to the statutory schema, the nonresident defendant is inexorably put to a Hobson's choice: either surrender by default the entire value of the seized property or submit to *in personam* jurisdiction. Keeping in mind the admonition of *Mullane* that constitutional standards do not depend on "elusive and confused" state law classifications, we wonder whether this jurisdiction realistically ought to be considered as *quasi in rem.* The purpose of the Delaware procedure is to coerce the nonresident to submit to *in personam* jurisdiction. And it is difficult to conceive of a more potent jurisdiction — irrespective of its label — than the jurisdiction exercised here. Unless Gregg chose to default the $2 million in stock certificates he could have been held personally to answer for a claim in excess of $20

million in a forum unrelated to him or the transaction at issue. Of course, if this case were analyzed under an *in personam* rubric, the conclusion we have reached would follow just as surely.

Having been persuaded that the statutory situs of stock in Delaware under 8 Del.C. §169 was an insufficient contact with the state constitutionally to support the jurisdiction here exercised, and that Gregg is entitled to relief on that basis, it is not necessary to meet Gregg's other constitutional contentions.

The judgment of default entered by the district court will be reversed and the proceedings remanded with a direction to dismiss the complaint for want of jurisdiction over the person.

APPENDIX F

U.S. INDUSTRIES, INC., a Corporation; and
Diversacon Industries, Inc., a Corporation,
Plaintiffs,

versus

F. BROWNE GREGG,
Defendant.

Civ. A. No. 4431

United States District Court,
D. Delaware.

MEMORANDUM OPINION AND ORDER

Wilmington, Delaware

April 24, 1975

STAPLETON, DISTRICT JUDGE:

This matter is now before me on defendant's renewed motion to reconsider his motion to quash the sequestration of certain assets. Defendant's motion asserts that the Delaware sequestration statute, 10 Del.C. §366, unconstitutionally denies due process of law to non-resident defendants. This Court has twice previously upheld these provisions in this case. *U.S. Industries v. Gregg*, 348 F.Supp. 1004 (D.Del. 1972); *U.S. Industries v. Gregg*, 58 F.R.D. 469 (D.Del. 1973). Defend-

ant now asks me to reconsider these rulings in the light of two recently decided cases: *Garcia v. Krausse*, 380 F.Supp. 1254 (S.D. Tex. 1974), and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, ____U.S. ____, 43 U.S.L.W. 4192 (Jan. 22, 1975). For the reasons which follow, I conclude that my previous rulings remain correct.

Garcia v. Krausse, supra, held Texas' sequestration statutes unconstitutional on the authority of *Fuentes v. Shevin*, 407 U.S. 67 (1972), and *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). I have already analyzed the Delaware sequestration statute under the principles of *Fuentes*, see 348 F.Supp., at 1020-1023; *Mitchell*, if anything, loosened the strictures of the Due Process Clause as applied to the states in this context. See 416 U.S., at 634-635 (Stewart, J., dissenting); 623 (Powell, J., concurring). *North Georgia Finishing, Inc. v. Di-Chem, Inc., supra*, "appears to resuscitate *Fuentes v. Shevin*," ____ U.S. ____, 43 U.S.L.W., at 4194 (Powell, J., concurring), but it does not appear to go beyond that case in any respect. Accordingly, I see no necessity to focus again upon the reasoning of these cases.* The motion will be denied.

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* In view of the emphasis in the *Mitchell* and *Di-Chem* cases on the need for a prompt hearing on the matter of possession *pendente lite*, see 416 U.S., at 610, 618; ____ U.S. ____, 43 U.S.L.W., at 4194, 4195, it bears noting here that the Delaware statute and rules do permit a defendant whose property is seized to obtain a speedy judicial determination of the propriety of the sequestration. By moving to quash the sequestration under Chancery Rule 12(b)(1) to (5) or (7), the defendant may make what is in effect a special appearance limited to this issue, and receive plenary judicial consideration. See *Schwartz v. Miner*, 136 A.2d 599 (Del. Ch. 1957); *Sands v. Lefcourt Realty Corp.*, 117 A.2d 365 (Del. Sup. Ct. 1955). This procedure has been followed in this case, see *U.S. Industries v. Gregg*, 348 F.Supp. 1004, 1016-1020 (1972), and in many others, see, *e.g.*, *Breech v. Hughes Tool Co.*, 189 A.2d 428 (Del.Sup.Ct. 1963), *aff'g T.W.A. v. Hughes*, 185 A.2d 762 (Del. Ch. 1962); *Gluck v. Chashin*, 210 A.2d 805 (Del.Sup.Ct. 1965); *Nickson v. Filtrol Corp.*, 265 A.2d 425 (Del. Ch. 1970); *Baker v. Gotz*, 336 F.Supp. 197 (D.Del. 1971), *aff'd*, 492 F.2d 1238 (3rd Cir. 1974); *U.S. v. Sinclair*, 347 F.Supp. 1129 (D.Del. 1972); *D'Angelo v. Petroleos Mexicanos*, 373 F.Supp. 1076 (D.Del. 1974).

The defendant cannot, however, challenge the legal sufficiency of the complaint under Rule 12(b)(6) without entering a general appearance. *Hughes v. T.W.A.*, 185 A.2d 886 (Del. Sup. Ct. 1962); *Widder v. Leeds*, 317 A.2d 32 (Del. Ch. 1974). I have already held this requirement constitutional. *U.S. Industries v. Gregg*, 58 F.R.D., at 478-481. Nor can the defendant, without appearing generally, move under the sequestration statute for the release of his property on the grounds that there is no "reasonable probability that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured." 10 Del.C. §366(a). If this were a case like *Fuentes*, *Mitchell*, or *Di-Chem*, where the only reason for the seizure was to assure the availability of assets for the satisfaction of a potential judgment, I might well question whether it would be constitutionally permissible to deprive the defendant of a hearing on this issue prior to his appearance in the case — a hearing which would go to the heart of "probable cause to believe there is a need to continue the [sequestration] for a sufficient period of time to allow proof and satisfaction of the alleged debt," *Di-Chem, supra* — ____ U.S., at ____, 43 U.S.L.W., at 4195 (Powell, J., concurring); and see majority opinion, at ____, 43 U.S.L.W., at 4194. But the Delaware sequestration statute is applicable only in the case of non-resident defendants, and its purpose is not merely to secure the property, but also to furnish the basis for the State's *quasi-in-rem* jurisdiction, see *Breech v. Hughes Tool Co., supra; U.S. Industries v. Gregg*, 348 F.Supp. 1004, 1020, which would be lost, absent a general appearance by the defendant, if the property were released. See *Schwartz v. Miner, supra; Di-Chem, supra*, ____ U.S., at ____ n. 1, 43 U.S.L.W., at 4195 n. 1 (Powell, J., concurring). Since this provides an independent justification for the sequestration not based on any facts peculiar to an individual defendant, the provision of a hearing on the necessity for sequestration would protect no "substantial rights," *Mitchell v. W. T. Grant Co., supra*, 416 U.S., at 610, quoting *NLRB v. Mackay Co.*, 304 U.S. 333, 351 (1938), and is, therefore, not constitutionally required.

ORDER

This 24th day of April, 1975, for the reasons appearing above, defendant's renewed motion for reconsideration of his motion to quash the sequestration in this case is denied.

WALTER K. STAPLETON,
United States District Judge.

APPENDIX G

U.S. INDUSTRIES, INC., a corporation
and Diversacon Industries, Inc., a corporation,
Plaintiffs,

versus

F. Browne GREGG,
Defendant.

Civ. A. No. 4431

United States District Court,
D. Delaware.

Feb. 2, 1973.

OPINION

STAPLETON, District Judge:

This action was originally filed in the Court of Chancery of the State of Delaware. Plaintiff, U.S. Industries, a Delaware corporation ("USI"), immediately secured an order from that court which sequestered certain shares of USI stock owned by the defendant Gregg, a Florida resident, under Delaware's sequestration statute, 10 Del. C. §366. Gregg, before making any response in the Court of Chancery, removed the case to this Court. In subsequent proceedings, this Court held that the sequestration was valid and that the case was properly removed under 28 U.S.C. §1441(c). The complaint asserted both federal and state claims. The holding on the removal question, however, was based upon a finding that plaintiff had alleged "a separate and independent claim" which "would have been removable if sued upon alone because of diversity of citizenship and the presence of the requisite jurisdictional amount. See U.S. Industries v. Gregg, 348 F.Supp. 1004 (D.Del. 1972).

Before the time for defendant's answer, he moved for leave to enter a "limited" or "restricted" appearance, claiming the right to defend plaintiff's claims on the merits without subjecting himself to the *in personam* jurisdiction of the court and thus the right to limit the satisfaction of any judgment obtained by the plaintiff

to the sequestered property itself. This motion is now before the Court for decision.[1]

Under the Delaware rule, as announced in Sands v. Lefcourt Realty Corp.,[2] Gregg would concededly be denied the permission he seeks. He asserts, however, that federal law controls the point and that, in any event, application of the Delaware rule would violate his right to due process of law under the Fourteenth Amendment to the United States Constitution. In this context, a number of questions are presented: (1) whether any federal statute or any of the Federal Rules of Civil Procedure decides the point either by way of declaring, expressly or by necessary implication, a federal rule or by incorporating the state rule, (2) if not, whether this Court should apply federal or state law, (3) if federal law is to be applied, what is the federal rule and (4) if

1 Plaintiff, relying on F.R.Civ.P. 12(g), maintains that Gregg waived any right he may have had to the relief here sought by failing to request that relief in conjunction with his attack upon the sequestration. I conclude, however, that Rule 12(g) is inapplicable. While the motion is in a sense similar to a "defense of lack of jurisdiction over the person," at the time of the attack on the sequestration the plaintiff was not claiming, and the court clearly did not have, jurisdiction over defendant's person and there was no need to challenge jurisdiction which had not been asserted. While it would have perhaps been better practice to have joined the current request as one for alternative relief, this motion nevertheless raises substantial and important issues from the defendant's point of view in a largely uncharted area, and I conclude that disposition on grounds of waiver would not be in the interest of justice. Defendant's form of motion has been used in other circumstances to raise similar issues. E.g. Grant v. Kellogg Co., 3 F.R.D. 229 (S.D.N.Y. 1943); Sands v. Lefcourt Realty Corp., 35 Del.Ch. 340, 117 A.2d 365 (Sup.Ct. 1955).

2 35 Del.Ch. 340, 117 A.2d 365 (Sup.Ct. 1955).

Gregg's choice is limited to one between default and general appearance, will he be deprived of due process?

I. THE FEDERAL STATUTES AND RULES.

Due process questions aside, this is an area in which Congress by statute, or the Supreme Court by rule, could, consistent with Erie v. Tompkins[3] and the Constitution, establish a controlling rule for decision.[4] Neither, however, has chosen to do so.

Section 1450 of Title 28 provides in part:

> Whenever any action is removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court.

USI urges that this statute incorporates Section 366 of Title 10 of the Delaware Code which, as the court in

3 Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

4 Hanna v. Plumer, 380 U.S. 460, 472, 85 S.Ct. 1136, 1144, 14 L.Ed.2d 8 (1965) (holding that such power exists "to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.")

the *Sands* case found, was drafted with the idea that limited appearances would not be available. The purpose of Section 1450, however, is to give a state attachment the same effect in a federal court after removal as it would have had in the state court; it incorporates state law to this extent.[5] I find no suggestion in the text of the statute, however, that it was intended to refer a federal court to state law for determination of when the federal court obtains *in personam* jurisdiction and when it does not.[6]

Federal Rule 81(c) provides that the Federal Rules of Civil Procedure shall apply to removed actions and shall "govern procedure after approval." No other federal rule, however, can be said to govern the question before this Court either expressly or by necessary implication. Rule 4(e) as amended in 1963, permits the institution of actions in a federal court by attachment and provides that "service shall be made . . . under the circumstances and in the manner prescribed in . . . [a state] statute or rule." Its scope is thus limited to serv-

5 1A Moore, Federal Practice, ¶ 0.168 [4-5].

6 This reading does not produce the procedural quagmire and jurisdictional dilemma which plaintiff predicts. Section 366 does require the Court of Chancery to release the seized property upon the entry of a "general appearance, absent a showing that release will make it 'substantially less likely that plaintiff will obtain satisfaction of any judgment secured.'" It does not follow, however, that this Court, in obeying the command of Section 1450 to hold the property under Section 366, would be required to act similarly upon the entry of a limited appearance and thereby lose its sole basis for jurisdiction.

ice of process and does not extend further.[7] The "legislative" history so indicate.[8]

Rule 12 in describing the responses to a complaint does not, it is true, refer to the possibility of a "limited appearance." This has helped one court to the conclusion that the rule excludes this alternative.[9] Moreover, Rule E(8) of the Supplemental Rules for Certain Admiralty and Maritime Claims, by contrast, expressly provides for limited appearances in the cases which it governs. But the temptation to draw a negative inference from the omission of a reference to limited appearances in Rule 12 should be resisted in light of the relevant advisory committee comments. The comments relating to Rule 12 do not indicate that any judgment was made on the issue.[10] The comment in connection with the 1963 amendments to Rule 4 likewise contained no mention of the problem.[11] The 1963 amend-

7 *Cf.* Arrowsmith v. United Press International, 320 F.2d 219, 224 (2nd Cir. 1963).

8 See notes 10 and 11, *infra;* Kaplan, Amendments of the Federal Rules of Civil Procedure, 1961-1963, 77 Harv.L.Rev. 601, 627-28 (1964). Prof. Carrington has taken the position that since the "whole thrust of the [proposed] Rule 4 (a) amendment is a reference to state law it may be presumed that the Committee would contemplate . . . use [of the limited appearance only] in states in which it is permitted in local courts." Carrington, The Modern Utility of Quasi in Rem Jurisdiction, 76 Harv.L.Rev. 303, 314 (1962). The Comments seem to indicate that the Committee did not so contemplate, however.

9 Grant v. Kellogg Co., 3 F.R.D. 229 (S.D.N.Y. 1943).

10 Notes of the Advisory Committee, 28 U.S.C. Rule 12 (1972 Supp.).

11 Notes of the Advisory Committee, 28 U.S.C. Rule 4 (1972 Supp.).

ment to Rule 13 and the 1965 adoption of admiralty rule E(8), however, produced affirmative evidence that the committee intended to "leave the matter open."[12] The concensus has, accordingly, been that the Federal Rules of Civil Procedure do not speak to the question now before this Court.[13]

II. WHETHER STATE OR FEDERAL LAW GOVERNS

Upon analysis, this second question presents two separate issues. While this Court's jurisdiction in this case is founded solely on the presence of a separate and independent diversity claim, plaintiff asserts a claim having its source in federal law[14] as well as claims grounded upon state law, and it is the source of a claim, rather than the basis of federal jurisdiction,

12 Note, "The 'Right' to Defend Federal Quasi in Rem Actions Without Submitting to the Jurisdiction of the Court," 48 Iowa L.Rev. 441, 442 n. 8 (1963); Notes of Advisory Committee, Admiralty & Maritime Rule E (Appendix to 28 U.S.C.A.).

13 2A Moore, Federal Practice, ¶ 12.13 p. 2333; 4 Wright & Miller, Fed.Prac. §1123, p. 514. The situation here is different from that which confronted the court in Neifeld v. Steinberg, 438 F.2d 423 (3rd Cir. 1971). There the court held that the joinder of a permissive counterclaim with a defense of lack of jurisdiction over the person did not waive the latter defense where the defendant had withdrawn the counterclaim without leave of court. Rule 12, while not expresly reading on the relevant question, was found to embody a scheme regarding responsive pleading and waiver which was inconsistent with the view that a waiver had occurred.

14 Section 17(a) of the Securities Act of 1933, 15 U.S.C.A. §77-q(a) (1971). Section 22(a) of that act would preclude removal if this claim were the only one asserted. USI v. Gregg, 348 F.Supp. 1004 (D.Del. 1972).

which is relevant in determining the law applicable to that claim. As the court observed in Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 540 n. 1 (2nd Cir. 1956):

> . . . despite repeated statements implying the contrary, it is the *source* of the right sued upon, and not the ground on which federal jurisdiction over the case is founded, which determines the governing law. . . . Thus, the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law. See, e.g., Rotherberg v. H. Rothstein & Sons, 3 Cir., 1950, 183 F.2d 524, 21 A.L.R.2d 832. *Cf.* Wichita Royalty Co. v. City National Bank, 1939, 306 U.S. 103, 107, 59 S.Ct. 420, 83 L.Ed. 515.

The converse is also true; where a diversity case includes a federal claim, the source of that claim is the relevant factor.[15]

This Court must, accordingly, consider Gregg's rights with respect to the federal claim as well as with respect to his state claims. While these choices of law involve analyses which are similar in some respects, the controlling principles and precedents are different.

15 1A Moore, Federal Practice, §0.305[3] p. 3054.

A. The State Claims.

Under Erie v. Tompkins[16] and its progeny[17] three questions are now relevant in determining whether state law or federal law will govern a question arising in connection with the assertion of a state created right: (1) whether the state rule is "bound up with . . . [state created] rights and obligations in such a way that its application in the federal court is required,"[18] (2) if not, would failure to follow the state rule be "outcome determinative" — that is, would it so materially affect the character or result of the litigation as to cause forum shopping or inequitable administration of the laws, and (3) even if failure to follow the state rule might produce either of these undesirable consequences, is there, nevertheless, a countervailing "strong federal policy"[19] which requires the application of federal law.[20] If the state rule is closely "bound up" with the state created claim, state law must be applied. Even if the state rule is one of "form and mode," however, state law must be applied, in the absence of a

16 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

17 E.g. Guaranty Trust Co. v. York, 326 U.S. 99, 65 S.Ct. 1464, 80 L.Ed. 2079 (1945); Boyd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958); Hanna v. Plummer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965).

18 Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525, 535, 78 S.Ct. 893, 899, 2 L.Ed.2d 953 (1958).

19 *Id.* at 536, 78 S.Ct. 893.

20 The Third Circuit Court of Appeals has read *Erie* and its progeny to indicate that these are the relevant questions. Lynne Carol Fashions, Inc. v. Cranston Paint Works Co., 453 F.2d 1177 (3rd Cir. 1972). See also Neifield v. Steinberg, 438 F.2d 423 (3rd Cir. 1971); Atkins v. Schmutz Manufacturing Co., 435 F.2d 527 (4th Cir. 1970).

strong countervailing federal policy, where the choice of federal law would lead to either of the aforementioned "twin evils" denounced in *Erie*.[21]

To state the relevant inquiries in this fashion does not, of course, close debate. There is no "automatic 'litmus paper' criterion."[22] It does, however, provide the guidelines for decision.

The rule of Sands v. Lefcourt Realty Corp. is not intimately bound up with the state rights which plaintiff here seeks to enforce. The policy behind the rule, namely to require that any adjudication on the merits of a claim permanently settle the rights of the parties with respect to that claim,[23] "reflects essentially institutional considerations relevant to the administration of justice" within the Delaware court system and is "unrelated to the basic rights and obligations of the parties."[24]

21 Hanna v. Plumer, 380 U.S. 460, 468, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965).

22 *Id.* at 460, 85 S.Ct. 1136.

23 A quasi-in-rem judgment does not have a *res judicata* effect on a subsequent action on the same claim, and collateral estoppel does not apply even as to issues actually litigated as long as the judgment is against the property and not the person. Restatement of Judgements §76 (1942); 4 Wright & Miller, Fed. Prac. & Proc., §1070 (1969).

24 Atkins v. Schmutz Manufacturing Co., 435 F.2d 527, 537 (4th Cir. 1970). The *Sands* rule would be applied by the Delaware courts in cases of this kind to rights created by the laws of another state. Here, for example, Florida law appears to be the source of at least some of the claims which plaintiff seeks to enforce. The fact that Delaware classifies the right as "procedural" for this purpose, does not, of course, require this Court to so characterize it for present purposes. Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940).

In a state which permits "limited appearances,"[25] the presence of a contrary rule in the federal courts of that state would obviously be an important factor in the plaintiff's choice of forum.[26] Similarly, where a state, like Delaware, does not permit limited appearances,[27] application of a contrary rule in the federal court would undoubtedly affect the nonresident defendant's election under the removal statute. 28 U.S.C. §1441. While the choice would here be made in a different context from that before the Court in *Erie*, the effect would be the same — the granting to a non-resident of a choice of law affecting the character and result of the litigation for reasons wholly unrelated to the purpose of diversity jurisdiction.

Since the choice of law on the question before this Court would be "outcome determinative" as that phrase has been construed by the Supreme Court,[28]

25 E.g. Maryland: Miller Brothers Co. v. State, 201 Md. 535, 95 A.2d 286 (1953); Massachusetts: Cheshire National Bank v. Jaynes, 224 Mass. 14, 112 N.E. 500 (1916); Oklahoma: Osborn v. White Eagle Oil Co., 355 P.2d 1041 (Okl. 1960).

26 B. Currie, Attachment and Garnishment in the Federal Courts, 59 Mich.L.Rev. 337 (1961); 4 Wright & Miller, Federal Prac. & Proc. §1123 at 514-515. While the potential discrimination here would be against a non-resident rather than a resident as in *Erie*, the policy of that case may still apply. Note, 15 Corn. L.Q. 560, 563 (1963).

27 E.g. Oregon: State ex rel. Methodist Old People's Home v. Crawford, 159 Or. 377, 80 P.2d 873 (1938); Rhode Island: Industrial Trust Co. v. Rabinowitz, 65 R.I. 20, 13 A.2d 259 (1940).

28 Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965).

state law must be applied unless there is a countervailing "strong federal policy." Whether such a policy exists is a question which I believe the federal courts should approach with restraint. If a federal rule exists or can be formulated, a federal policy, in a sense, will be present by definition. A federal rule of limited appearance could be said to rest upon a federal policy against the dilemma in which a general appearance rule places the defendant. A federal rule of general appearance could be said to rest on a federal policy against re-litigation of issues. The "strong federal policy" exception, however, should be limited to cases where the federal policy is clearly established by the federal constitution or a federal statute and where application of the state rule would "alter the essential character of function of a federal court."[29] An extension of the exception beyond such cases would lead to a return to the philosophy of the Swift v. Tyson era and, under the theoretical guise of protecting an interest in uniformity among the federal courts, create, in fact, as many different "federal rules" as there are views on what constitutes "strong federal policy."[30]

In this instance, I find no clearly defined, federal policy relating to the essential character of the federal

29 Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525, 539, 78 S.Ct. 893, 901, 2 L.Ed.2d 953 (1958).

30 See Note, "State Statutes of Limitations in Federal Courts: By Whom the Statute Tolled," 1971 Duke L.J. 785, 790-799, 801-803. While Supreme Court review would establish "uniformity" conflict in the lower court "policy calls" would by no means assure Supreme Court review. See Stern, Denial of Certiorari Despite a Conflict, 66 Harv.L.Rev. 465 (1953).

judicial system. As hereinafter indicated, the Constitution neither dictates nor clearly embodies a policy supporting, one rule or the other. The same is true of the federal statutory law. The sparse federal case law is in conflict.[31] Moreover, application of one rule or the other will not disrupt or alter the essential character of the federal proceeding. If the defendant defends on the merits, the issues will be litigated and decided in precisely the same manner whether the appearance is general or limited. If the defendant fails to appear, the case will also proceed in precisely the same manner. In short, there is an "absence of any established federal principle or discernible federal policy on the point."[32]

Accordingly, this Court considers itself bound to apply the rule of Sands v. Lefcourt Realty Corp. to plaintiff's state court claims.

B. The Federal Claim

The Supreme Court of the United States has stated on a number of occasions that the doctrine of Erie v. Tompkins is inapplicable where a federally created right is involved.[33] The meaning and ramifications of

31 See review of cases in 2A Moore, Federal Practice ¶ 12.13 pp. 2330-2334.

32 4 Wright & Miller, Fed. Prac. & Proc. §1123 p. 515.

33 Board of Commissioners v. United States, 308 U.S. 343, 60 S.Ct. 285, 84 L.Ed. 313 (1939); Deitrick v. Greaney, 309 U.S. 190, 60 S.Ct. 480, 84 L.Ed. 694 (1940); D'Oench, Duhme & Co. v. F.D.I.C., 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed.956 (1942) (Jackson, J., concurring); Levinson v. Deupree, 345 U.S. 648, 73 S.Ct. 914, 97 L.Ed. 1319 (1953).

these statements have not been fully articulated by that court, however, and are subjects about which there has been considerable academic comment.[34] Some conclusions may nevertheless be drawn from the cases in this area. Legitimate state interests, where they exist, may not be ignored in making the choice of law even where a federal claim is at issue.[35] In a few instances state rules have been applied even as to matters which would be "procedural" in traditional conflicts terminology.[36] In cases where the matter is one of procedure in that sense, however, rarely will there be a significant state interest in having a state rule applied to the enforcement of a federal claim even though it be "outcome determinative" in *Erie* terms.[37] Ordinarily,

34 See e.g., Hill, State Procedural Law in Federal Nondiversity Litigation, 69 Harv.L.Rev. 66 (1955); Mishkin, The Variousness of "Federal Law:" Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. of Pa.L.Rev. 797 (1957); Note, Rules of Decision in Nondiversity Suits, 69 Yale L.J. 1428 (1960); Note, The Competence of Federal Courts to Formulate Rules of Decision, 77 Harv.L.Rev. 1084 (1964).

35 E.g. United States v. Yazell, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966). Whether this is dictated by the Rules of Decisions Act, 28 U.S.C. §1652, or is discerned from the principles underlying our federal system has not been authoritatively determined. See Mishkin, *supra*, note 34; Hill, *supra*, note 34.

36 Camden & Suburban Ry. Co. v. Stetson, 177 U.S. 172, 20 S.Ct. 617, 44 L.Ed. 721 (1900) (applying state rule permitting physical examination of a plaintiff); Campbell v. Haverhill, 155 U.S. 610, 15 S.Ct. 217, 39 L.Ed. 280 (1895) (applying state limitations statute); Hill, *supra*, note 34.

37 Hill, *supra*, note 34 at 91-94. Where a procedural rule is "outcome determinative" it may be held that it conflicts with the federal statute which created the right and, for that reason, must not be applied even if a state court proceeding. E.g. Brown v. Western Ry., 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed. 100 (1949); Dice v. Akron, C. & Y. R. Co., 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952).

such state rules are applied only when circumstances are such that Congress may fairly be said to have intended their adoption.[38] Even where state interests exist, however, they must yield to any federal interest discernible from the federal legislation giving rise to the claim,[39] from considerations involving executive administration of the federal law[40] or from the character of the federal judicial system.[41]

Accordingly, while the guidelines of *Erie* and its progeny are not applicable to the resolution of choice of law problems in a federal claim context, the choice in that context nevertheless also involves a process of ascertaining any relevant state and federal interests. Here the problem is not difficult of resolution because I perceive no Delaware interest in whether this Court applies a limited or general appearance rule in a case being litigated in this Court to enforce a right created by the Securities Act of 1933.

I conclude, accordingly, that this Court is not required to apply the Delaware appearance rule to USI's

38 E.g. Campbell v. Haverhill, 155 U.S. 610, 15 S.Ct. 217, 39 L.Ed. 280 (1900); Chattanooga Foundry and Pipe Works v. Atlanta, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241 (1906); Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961).

39 D'Oench, Duhme & Co. v. F.D.I.C., 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942); Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943).

40 United States v. Hext, 444 F.2d 804 (5th Cir. 1971); United States v. Sommerville, 324 F.2d 712 (3rd Cir. 1963).

41 Monarch Insurance Co. v. Spach, 281 F.2d 401 (5th Cir. 1961); Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961).

federal claim. This leaves the Court with the task of choosing one of three alternatives based on what it is able to infer from the federal statutory, regulatory, rule and case law: (1) a general appearance rule, (2) a limited appearance rule, or (3) a rule of adoption of state law.

III. THE APPROPRIATE FEDERAL RULE.

It is unnecessary in this case to formulate a federal rule applicable to all cases under the Securities Act of 1933 which are litigated in a federal court.[42] This case arises under rather unusual circumstances and a choice for the present case is sufficient.

Section 22(a)[43] of the Securities Act provides for concurrent state-federal jurisdiction over actions arising under the Act. Moreover, that section expressly prohibits removal of Securities Act claim brought in a state court. It is clear that out of solicitude for Securities Act claimants Congress intended one asserting a claim solely under the Act to be entitled to have his claim litigated in a state court. Delaware practice provides for *in personam* jurisdiction over the defendant if he appears to defend on the merits. Presumably, Congress contem-

42 The present problem will arise rarely in a Securities Act case instituted originally in a federal court since the Act authorizes personal service outside the forum district in such case in any district where the defendant can be found. 15 U.S.C.A. §77v.

43 15 U.S.C.A. §77v.

plated that such a Securities Act plaintiff in Delaware would have the benefit of this rule.[44]

In this case USI joined its Securities Act claim with a "separate and independent" state claim. In its earlier opinion this Court noted the conflict between the policy behind the non-removal provisions of Section 22(a) and the twin policies of Section 1441(c): (1) to assure that a defendant entitled to a federal forum for litigation of a diversity claim or removable federal claim will not be deprived of that right by his adversary's joinder of a non-removable, separate and independent claim and (2) at the same time, to insure that all claims which should be litigated together for reasons of judicial economy be litigated in the same forum. Based on the text of Section 1441, this Court concluded that the policy of Section 22(a) must yield to those of Section 1441(c). The policies of Section 1441(c) do not, however, require that a suit which would be an *in personam* one in the forum of the plaintiff's choosing must become something entirely different if the suit is removed. Those policies can be effectuated without applying a limited appearance rule.

If USI were asserting solely a Securities Act claim it would be entitled, after litigating its claim on the merits

44 Nothing in the Securities Act would provide a basis for a claim that Delaware would be required to apply federal law on this point, and in the absence of some such basis in the federal law, a state court is free to follow its own rules in a concurrent jurisdiction case. Brown v. Western Ry., 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed. 100 (1949); Dice v. Akron, C. & Y. R. Co., 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952).

in Delaware, to receive an *in personam* judgment pursuant to Delaware's general appearance rule. It would be anomalous, indeed, to deprive USI of this result merely because it also presses a "separate and independent" state law claim as to which, as I have held above, USI has a right to the application of the state rule.

In short, I conclude that a federal district court in a case of this character should apply the state rule of general appearance by adoption.

IV. THE CONSTITUTIONALITY OF THE RULE OF SANDS v. LEFCOURT REALTY CORP.

Gregg correctly asserts that under the Due Process Clause of the Fourteenth Amendment he has a right to defend the property which has been seized. He concedes that a general appearance rule would not deprive him of an opportunity to defend but asserts that it would unconstitutionally condition his right to defend on the merits by requiring that he first submit himself to the *in personam* jurisdiction of the Court.

Not all conditions on the exercise of a Fourteenth Amendment right are constitutionally prohibited. Rule 13 and state compulsory counterclaim rules, for example, provide that a defendant, if he wishes to defend a plaintiff's claim, must pay a price for being permitted to do so — he must submit any claim he may have arising out of the same transaction for disposition by the Court or lose that claim.

The question, accordingly, is not whether Gregg's constitutional right to defend has been conditioned, but rather whether it has been unreasonably conditioned.[45] What is reasonable or unreasonable in this context can only be answered with reference to the public interest involved in requiring a general appearance and the burden which such a rule places upon the defendant.

There is, in my judgment, a legitimate public interest behind the general appearance rule. If a state or fed-

45 *Cf.* York v. Texas, 137 U.S. 15, 20, 11 S.Ct. 9, 10, 34 L.Ed. 604 (1890) (upholding the constitutionality of a Texas statute under which an appearance solely to attach service of process and jurisdiction over the person constituted a general appearance, thereby, in effect, requiring a non-resident to choose between entering a general appearance or losing his right to defend a claim on its merits in the event the service is found to be sufficient):

> The State has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants.

Adam v. Saenger, 303 U.S. 59, 67-68, 58 S.Ct. 454, 458, 82 L.Ed. 649 (1938) (holding that a state may condition a non-resident plaintiff's right to litigate in its courts by requiring that he submit himself to the *in personam* jurisdiction of its courts for the litigation of unrelated claims against him without personal service of process on him):

> . . . The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its courts to the plaintiff. Frank L. Young Co. v. McNeal-Edwards Co., 283 U.S. 398, 400, 51 S.Ct. 538, 539, 75 L.Ed. 1140; cf. Chicago & N.W. Ry. Co. v. Lindell, 281 U.S. 14, 17, 50 S.Ct. 200, 201, 74 L.Ed. 670.

McGautha v. California, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971).

eral court is required by a defendant's response to a complaint to try and determine all of the issues upon which an *in personam* claim turns, there is a public interest in having that expenditure of judicial resources settle the rights of the parties with respect to that claim and in not leaving open the possibility of subsequent, duplicative litigation in the same court or another.[46] This interest is similar to, though stronger, than,[47] the one reflected in compulsory counterclaim rules.

One must still ask, however, whether the price which a general appearance rule extracts from a defendant is excessive despite the countervailing public interest. Gregg suggests that it is because the forum, by definition, is one with which his only contact is the presence of his property within its jurisdiction. Requiring him to litigate in such a forum, he says, imposes an unconscionable burden. This Court has already held, however, that the acquisition of quasi-in-rem jurisdiction by sequestration is constitutional.[48]

46 Note, The "Right" to Defend Federal Quasi in Rem Actions Without Submitting to the Personal Jurisdiction of the Court, 48 Iowa L.Rev. 441 (1963); Moore, Federal Practice, ¶12.13 n. 16; 4 Wright & Miller, *supra*, §1123 at 514.

47 In a compulsory counterclaim context, the court, in the absence of a compulsory counterclaim rule, would not ordinarily be required to try and determine all of the issues upon which the counterclaim rests. The potential for waste of judicial resources, while present, is accordingly, not as great. For this reason, the 1963 amendment to Rule 13(a) (i.e. permitting a defendant brought into court under Rule 4(e) to withhold a compulsory counterclaim) is not relevant to any question here posed. It is one thing to conclude that it is fair to permit a defendant to withhold a separate claim from adjudication and quite another to conclude that fairness to a defendant requires that he be allowed two days in court on the same claim.

48 USI v. Gregg, 348 F.Supp. 1004 (D.Del. 1972).

Given the right of a court to require that a defendant whose property is seized defend on the merits or default, it is difficult to see what additional litigation burden a general appearance rule imposes upon a defendant. If he defaults recovery will be limited to the property seized. If he defends on the merits the trouble and expense of litigation will be no different whether a general or limited appearance rule is applied.[49]

Also unpersuasive is Gregg's argument that a general appearance rule gives a plaintiff an unfair advantage by allowing him to bring suit on a large claim in a jurisdiction where the original basis for jurisdiction is the presence of property having a comparatively small value. Any such unfairness does not rise to constitutional proportions. A similar phenomenon frequently occurs under compulsory counterclaim rules.

Put in Gregg's "contact" terminology, if he defends upon the merits he has created an additional relationship with the forum jurisdiction; he is present in the

49 As one commentator has observed, the arguments of inconvenience are more properly addressed to the question of whether quasi-in-rem jurisdiction should be permitted rather than to the question of choosing between a general and limited appearance rule. Note, 48 Iowa L.Rev. 441, 448 (1963). It is, of course, true that a general appearance rule will require the defendant to put more "at risk" in the forum jurisdiction if he wishes to litigate on the merits. This, however, is not a burden, in any realistic sense, except insofar as it relates to considerations of litigation convenience. The question is not one of "risk" but one of where and when the parties' rights will be determined. Defendant is "at risk" to the full extent of plaintiff's claim wherever he may be found. A general appearance rule deprives the defendant only of the opportunity to litigate twice, once in the forum state and once later in a jurisdiction where he may be served.

forum court to litigate the factual and legal issues upon which a claim turns. This is sufficient contact to permit the court to adjudicate that very claim once and for all.[50] The scant judicial authority on the question supports this conclusion.[51] The Restatement of Judgments

50 Where the claim sought to be adjudicated is sufficiently related to a single act of the defendant either within the forum state or causing an effect there, that isolated act will support *in personam* jurisdiction under the "minimum contacts" theory even though there has been no personal service within the jurisdiction. McGee v. International Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957); Duple Motor Bodies, Ltd. v. Hollingsworth, 417 F.2d 231 (9th Cir. 1969); Bean v. Linden Crane Co., 326 F.Supp. 995 (E.D.Pa. 1971). Cf. Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927). While the "relationship" under these contacts theory cases is of a different sort than the relationship created by defendant's defense on the merits, the rationale underlying the contacts theory is nevertheless applicable. The relevant question is whether balancing the state interests sought to be protected against the burden placed upon the defendant, it "offends traditional notions of fair play and substantial justice", International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945), to require a defendant to litigate a claim in the forum state. McGee v. International Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957).

51 United States v. Balanovski, 236 F.2d 298 (2nd Cir. 1956) (per Clark, C.J.); Grant v. Kellogg Co., 3 F.R.D. 229 (S.D.N.Y. 1943); Bede Steam Shipping Co. v. New York Trust Co., 54 F.2d 658 (S.D.N.Y. 1931); Campbell v. Murdock, 90 F.Supp. 297 (N.D.Ohio 1950). Dewey v. Des Moines, 173 U.S. 193, 19 S.Ct. 379, 43 L.Ed.665 (1899), relied upon most heavily by defendant, is not in point. That case dealt with jurisdiction to litigate. While the court did there treat an assessment on real property as being "in the nature of a judgment," this aspect of the case does not support defendant's position here. The assessment purported to impose personal liability upon a non-resident landowner. At the time of the assessment the non-resident had not been notified and his only contact with the state was his ownership of property. The court declared the personal liability portion of the assessment to be unconstitutional. This holding would be relevant in this case only if Gregg defaulted and this Court purported to enter an *in personam* judgment.

and Professors Moore and Blume have reached similar conclusions.[52]

In short, weighing the public interest and the burden imposed upon the defendant, I conclude that a general appearance requirement does not violate due process.

The rule of Sands v. Lefcourt Realty Corp. is constitutional. It will be applied with respect to all claims in this action. While the defendant may file a limited appearance if he deems it necessary to preserve any appellate rights he may have, in that event any judgment awarded to plaintiff will, nevertheless, be an *in personam* one.

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52 Restatement of Judgments §40 Comment (a) 1942); 2A Moore, Federal Practice ¶ 12.13 n. 16 (1972); Blume, Actions Quasi in Rem Under Section 1655, Title 28 U.S.C., 50 Mich.L.Rev. 1 (1951). But see, Developments in the Law—Jurisdiction, 73 Harv.L.Rev. 909, 953 (1960).

APPENDIX H

U.S. INDUSTRIES, INC., a corporation
and Diversacon Industries, Inc., a corporation,
Plaintiffs,

versus

F. Browne GREGG,
Defendant.

Civ. A. No. 4431

United States District Court, D. Delaware.

OPINION

STAPLETON, District Judge.

U.S. Industries, Inc., a Delaware corporation having its principal place of business in New York ("USI"), and Diversacon Industries, Inc., a Florida corporation having its principal place of business in Florida ("Diversacon"), instituted this action in the Court of Chancery of the State of Delaware against F. Browne Gregg, a citizen of the State of Florida. In the latter part of 1969 USI and Gregg entered into an Agreement and Plan of Reorganization (the "Agreement"). In this Agreement USI committed itself to purchase from Gregg all of the issued and outstanding shares of capital stock of certain corporations controlled by Gregg (the "Gregg corporations") in exchange for shares of USI voting common and special preference stock. The

agreement also provided for the execution of an employment contract under which Gregg would commit himself to USI to serve as an executive of the Gregg corporations. Such a contract was entered into at the closing of the transaction on October 20, 1969. Subsequent to that closing and as contemplated by the Agreement, the businesses formerly conducted by the Gregg corporations were transferred to the plaintiff Diversacon, a wholly owned subsidiary of USI.

The complaint is divided into eight counts. Those counts set forth the following claims:

1. A common law deceit claim by USI against Gregg based on allegations that Gregg made representations of material facts which were false and misleading and omitted to state material facts necessary in order to make the statements made not misleading in order to induce USI to enter the Agreement.

2. A claim by USI against Gregg under Section 17(a) of the Securities Act of 1933 based on the same factual allegations stated in Count 1 plus the allegation that instrumentalities of interstate commerce were utilized by Gregg.

3. A common law breach of warranty claim by USI against Gregg based upon the same factual allegations contained in Count 1.

4. A claim by USI against Gregg for the impressment of constructive trust upon Gregg's USI stock

based upon the foregoing factual allegations and an additional allegation that Gregg intends to sell, transfer or otherwise dispose of or encumber said stock and that this would irreparably damage USI by rendering judgment ineffectual.

5. A common law recission claim by USI against Gregg based on the foregoing factual allegations and the assertion that USI was fraudulently induced to employ Gregg pursuant to the employment agreement.

6(a). A breach of contract claim by USI against Gregg based on an allegation that Gregg breached his commitment to devote his full business time and best efforts to the business of the Gregg corporations or any successor entity "by mismanaging Diversacon, as by, among other things, undertaking contracts on the basis of estimates of the corporations ability to complete them which he knew or should have known to be erroneous, thereby committing the corporation to contracts on terms it could not meet."

(b). A breach of fiduciary duty claim by Diversacon against Gregg based on an allegation that the same "mismanagement" constituted a breach of duty owed by Gregg as an employee of Diversacon.

7. A breach of contract claim by USI against Gregg based on an allegation that Gregg breached a covenant not to compete "in that, while in the employ of USI,

Gregg bid successfully against USI for the acquisition of Can Concrete Rock Co., Inc., a Florida corporation, witn actual or constructive knowledge of USI's bid."

8. A breach of contract claim by Diversacon against Gregg based on an allegation that Gregg has failed to pay Diversacon on a $500,000 note executed by Gregg in favor of the Gregg corporations, executed on October 20, 1969.

The complaint asks the following relief:

(a) Claims 1, 2 and 3—$20,000,000,

(b) Claim 4—the impressment of a trust,

(c) Claim 5—return of the compensation paid Gregg,

(d) Claims 6 and 7—unspecified compensatory damages, and

(e) Claim 8—$400,000 plus interest.

After filing its complaint, USI secured an order of the Court of Chancery purporting to sequester all shares of common and preferred stock of USI "owned, of record or beneficially, by said defendant." The sequestrator was authorized "to seize and hold said property and any right, title or interest, legal or equitable, which" Gregg had therein.

The First National Bank of Leesburg, Leesburg, Florida, intervened in the Chancery action and moved

to quash the order of sequestration on the ground that it held the "equitable ownership" of the stock as a result of a pledge thereof in December of 1971 as security for a loan. The motion to quash was argued before the Court of Chancery, but the case was removed by Gregg before any decision on that motion was handed down. Following removal, the bank renewed its motion to quash the sequestration[1] and plaintiffs moved to remand the case to the Court of Chancery. Thereafter Gregg also moved to quash the sequestration and to dismiss this action.

These motions present four issues for resolution. First, is this case properly removable under §1441 of Title 28 of the United States Code? Second, if so, does the specific non-removal provision of the Securities Act of 1933, 15 U.S.C. §77a et seq., prevent removal? Third, is the sequestration order, upon which the state court's jurisdiction was predicated and from whence our jurisdiction derives, valid? And, finally, if this Court has jurisdiction should any of the claims asserted be remanded to the state court?

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1 Plaintiffs concede that the sequestration could not have seized any interest which Gregg did not possess at the time of sequestration in June of 1972 and that the bank's rights under its pledge agreement are senior. The Court has offered to amend the order of sequestration to permit the bank to exercise any of the rights given to it by the pledge agreement, including the right of sale subject to any right Gregg may have with respect to the proceeds exceeding the amount of the loan. The bank has thus far, however, asked for and received only an amendment to the order of sequestration permitting the transfer of the stock into the name of the bank on the records of the company as provided for in the pledge agreement.

I. REMOVAL UNDER §1441

In support of his removal, Gregg relies on §1441(c) of Title 28 of the United States Code which provides:

> "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

Plaintiffs, in support of remand, assert that there is no "separate and independent claim or cause of action" in their complaint, "which would be removable if sued upon alone." They assert both that the complaint states no claim or cause of action which is separate and independent of the others, and, in the alternative, that if there is a separate and independent claim or cause of action its removal is barred either by want of complete diversity between adverse parties or by Section 22 of the Securities Act of 1933, 15 U.S.C. §77v(a), which provides in part:

> ". . . No case arising under this subchapter [the Securities Act of 1933] and brought in any State court of competent jurisdiction shall be removed to any court of the United States. . . ."

Plaintiffs' initial argument stresses that all claims in the complaint arise as a result of USI's acquisition of the Gregg corporations. Plaintiffs correctly assert that the diversity of legal theories supporting the various claims and the fact that each does not rest upon the identical factual allegations is not determinative.[2] Assuming, however, that all the claims here asserted do arise out of the same "interlocked series of transactions" as that phrase is used in the relevant legal standard, plaintiffs' analysis ignores another equally important element in that standard.

In American Fire & Casualty Co. v. Finn, 341 U.S. 6, 14, 71 S.Ct. 534, 540, 95 L.Ed. 702 (1951), the Supreme Court held that "where there is *a single wrong* to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under §1441(c)." It is clear from this statement, the *Finn* opinion as a whole, and the subsequent cases applying its rationale that related transactions and common questions of law or fact are not alone enough to weld claims together for the purpose of applying §1441(c). The circumstances and character of the impact upon the plaintiff or plaintiffs are also crucial.[3] Elsewhere in its opinion the Supreme

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2 American Fire & Casualty Co. v. Finn, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951).

3 See analysis in Mayflower Industries v. Thor Corp., 184 F.2d 537 (3rd Cir. 1950); Twentieth Century Fox Film Corporation v. Taylor, 239 F.Supp. 913 (S.D.N.Y. 1965); Pinto v. Maremont Corporation, 326 F.Supp. 165 (S.D.N.Y. 1971); Greenshields v. Warren Petroleum, 248 F.2d 61 (10th Cir. 1957); Unanue v. Caribbean Canneries, Inc., 323 F.Supp. 63 (D.Del. 1971); 1A Moore, Federal Practice, ¶ 0.163[4-5], pp. 708, 712-713.

Court suggests that inquiry must be made of whether there was "a single wrongful invasion of a single primary right of the plaintiff" — "one actionable wrong" for which plaintiff "was entitled to but one recovery" — damage arising from "a single incident." 341 U.S. at 13, 16, 71 S.Ct. at 540. As will appear hereafter the second part of this test is important in the context of this case and precludes a finding that no claim asserted is separate and independent of the others.

I accept plaintiffs' argument that Claims 1 through 5 are not separate and independent. All of these claims allege facts occurring in connection with a single transaction and assert but a single invasion of a single right, i.e., USI's right to be free from deception in its business dealings with others. The alleged damage to USI resulted from a single incident, consummation of a fraudulently induced bargain. Korber v. Lehman, 221 F.Supp. 358 (S.D.N.Y. 1963).

While the matter is not quite so clear, I agree with plaintiffs that Claims 6(a) and (b) are not separate and independent of each other. There is a split among the commentators as to whether plaintiffs who do not rely upon a right held jointly can ever be said to assert claims that are not separate and independent. The cases show a greater willingness to find separate and independent claims in situations where multiple plaintiffs have claims against a defendant or defendants than in situations where a single plaintiff asserts several multiple claims against a defendant or defendants. However, where the facts alleged arise out of the same

transaction and damage to the respective plaintiffs is similar in kind and arises from a single incident, nothing in the *Finn* rationale would appear to dictate a holding of separate and independent claims. While the claims of the respective plaintiffs may be "separate," they are not "independent." Fugard v. Thierry, 265 F.Supp. 743 (N.D.Ill. 1967); Rosen v. Rozan, 179 F.Supp. 829 (D.C.Mont. 1960); Wright, Federal Courts, §39, n. 18 (1972 Supp.); Note, 52 Columbia L.Rev. 101, 106-107 (1952).

While USI's Claim 6(b) is for breach of contract and Diversacon's 6(a) claim is for breach of fiduciary duty, both rest upon the same facts. Any injury to these plaintiffs would result from a single invasion of a same interest and would "come from a single incident." USI, as a sole stockholder of Diversacon, had an interest in the quality of the management of Diversacon which it sought to protect by contract. Any invasion of that interest would be a simultaneous invasion of an identical interest of Diversacon's. While USI might conceivably be entitled to some damage not recoverable by Diversacon, any damage would necessarily stem from injury to Diversacon and any damage for which Diversacon recovered would not be recoverable by USI.

Since the claims stated in Claims 1 through 5 are not removable by reason of Section 22(a) of the Securities Act[4] and the claims stated in Claims 6(a), 6(b), and 8 are not removable for want of either complete diversity or

4 *Cf.* Pate v. Standard Dredging Corp., 193 F.2d 498 (5th Cir. 1952).

a federal claim, the crucial question becomes whether Claim 7 states a claim separate and independent of the other claims in the complaint. Plaintiffs argue that, at a minimum, Count 7 is not separate and independent of Claims 6(a) and (b). First, they suggest that Claim 7, fairly read, alleges an injury to USI through competition by Gregg with Diversacon, and that the interest allegedly invaded in that claim is the same as the common interest of USI and Diversacon allegedly invaded in Claim 6. Claim 7 in plaintiffs' view is only a particularization of the "mismanagement of Diversacon, Inc." alleged in Claims 6(a) and (b). Accordingly, plaintiffs conclude that Claim 7 is not a separate and independent claim. I do not agree with this conclusion.

Assuming that competition with USI through appropriation of a corporate opportunity of Diversacon could fairly be said to come within the conclusory allegation of "mismanagement of Diversacon,"[5] this does not answer the relevant question unless all claims against a single fiduciary for corporate mismanagement necessarily constitute non-separate, non-independent claims. I see no reason to so hold. Here as in other areas the question must be whether the facts relied upon by the pleader show separate and independent claims.

Claim 6 alleges that Gregg committed Diversacon to contracts which he knew or should have known would be non-profitable to the detriment of USI and Diversa-

5 This assumption, at the least, stretches the concept of mismanagement beyond its commonly accepted scope.

con.[6] Claim 7, liberally construed in the context of the attachments to the complaint, alleges a claim that Gregg damaged USI by bidding for a company which competes with Diversacon.

I conclude that these are separate and independent claims. The only things which they have in common are that they arise in the context of relationships initially established in the USI acquisitions of the Gregg corporations, and, that as to USI, they allegedly constitute breaches of the same employment contract. Except for this common background, the transactions from which these claims arise are neither similar in character nor otherwise related. The alleged injuries complained of in Claims 6 and 7 do not result from a single incident or invasion. Moreover, the impact on USI and Diversacon of the Diversacon contracts referred to in Claim 6 and the impact on them of the Concrete Rock acquisition referred to in Claim 7 appear wholly unrelated in time or character. USI could recover damages for either wrong without recovering damages for the other or could recover for both without creating any problem of duplication of damages.

6 The general allegation that Gregg has been guilty of "mismanaging" Diversacon to the extent it does more than characterize the facts alleged in this claim, is no more than a conclusion which can and should be disregarded for present purposes. "The subject matter of the controversy is whatever the plaintiff in good faith declares it to be in his pleadings, not by conclusions of law but by well-pleaded allegations of fact." Edwards v. E. I. DuPont de Nemours & Co., 183 F.2d 165, 168 (5th Cir. 1950).

In view of the otherwise distinct character of these claims, the question boils down to whether breach of contract claims based on the same contract are necessarily non-separate, non-independent claims for purposes of Section 1441(c). I have found no case which directly passes upon this question. A negative response is dictated, however, by those authorities recognizing that the existence of common questions of law or fact are not alone enough to preclude removal under that section.

The only remaining question is whether Claim 7 is separate and independent from Claims 1 through 5 and from Claim 8. I conclude that it is. As heretofore noted, the wrong to USI in Claims 1 through 5 flowed from the consummation of a fraudulently induced bargain. It is wholly unrelated to the wrong to USI flowing from the alleged breach of the covenant not to compete and the wrong to Diversacon flowing from the alleged default on the note. While it is perhaps true that USI could not recover on its fifth claim for rescission of the employment contract and on its seventh claim for breach of the covenant not to compete, this is because the claims are legally inconsistent and not because a monetary recovery on one would compensate USI for the alleged injury arising from the other.[7]

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7 Pinto v. Maremont Corporation, 326 F.Supp. 165 (S.D.N.Y. 1971) is the only case found which arguably supports a conclusion contrary to the one I here reach. That case does not go as far, in my judgment, as plaintiffs suggest. The nature of the misrepresentation in the *Pinto* case is not disclosed in the opinion. However, the court's observation that "recovery could not be had under both the Securities Act claim and the contract claims," together with its reliance at this point on Korber v. Lehman, 221 F.Supp. 358 (S.D.N.Y. 1963) leads me to believe the damage to the plaintiff on the misrepresentation claims and those on the contract claims was identical and recovery on either would compensate plaintiffs for the same injury.

II. SECTION 22(a) OF THE SECURITIES ACT

The conclusion that Claim 7 is a separate and independent claim which because of diversity of citizenship would be removable if sued upon alone necessitates an examination of the relationship between §1441(c) of Title 28 and Section 22 of the Securities Act of 1933, 15 U.S.C. §77v.

Despite the separate and independent character of Claim 7, Claim 2, arising under the Securities Act, nevertheless remains in the case. It can be argued that Section 22(a) precludes the removal of any action containing a claim under the Securities Act and that such a construction of the relevant statutes comports with the general policy favoring strict construction of the removal provisions. 1A Moore, Federal Practice, ¶ 0.157 [1.3]. The question presented by this argument appears to be one of first impression although a few cases have considered similar questions arising under statutes similar to Section 22(a) in language and purpose.

Both the Jones Act, 46 U.S.C. §688, and the Federal Employers' Liability Act, 45 U.S.C. §§51-56, similarly prohibit removal of claims asserted thereunder. 28 U.S.C. §1445(a). Since the 1948 revision of the Judicial Code and the expansive reading given to §1441(c) by

the Supreme Court in *Finn*, rarely has a court, faced with a possible conflict between §1441(c) and the applicable non-removal provision, found a "separate and independent" claim. The question is thus avoided in the overwhelming number of reported cases.[8] There are, however, a handful of vintage district court opinions which decide that the joinder of a state law cause of action with a F.E.L.A. claim makes the whole case removable in the presence of the requisite diversity. Strother v. Union Pac. R. Co., 220 F. 731 (W.D.Mo. 1915); Bedell v. Baltimore & O. R. Co., 245 F. 788 (Ohio 1917); Givens v. Wight, 247 F. 233 (N.D.Tex. 1918). The legal theory upon which the question is there resolved is that in joining removable claims to a statutorily non-removable one the plaintiff "waived" his right to the forum of his choice. Other cases from the same period, however, refer to the statutory provisions restricting removability as "jurisdictional" and indicate that there are no circumstances under which a case falling thereunder could be removed. Mitchell v. Southern Ry. Co., 247 F. 819 (N.D.Ga. 1917); Jones v. Southern Ry., 236 F. 584 (N.D.Ga. 1916).

Only one modern case has squarely decided the question. In Emery v. Chicago, B. & Q. R. Co., 119 F.Supp.

8 See e.g., Pate v. Standard Dredging Corp., 193 F.2d 498 (5th Cir. 1952) (an action for negligence under the Jones Act and for unseaworthiness under general maritime law did not state separate and independent claims and was thus non-removable under the Jones Act). *Accord*, Gutierrez v. Pacific Tankers, 81 F.Supp. 278 (S.D.Tex. 1948); Greene v. United Fruit Co., 85 F.Supp. 81 (S.D.N.Y. 1949); McKee v. Merritt-Chapman & Scott Corp., 144 F.Supp. 423 (N.D.Ill. 1956); Hall v. Illinois Cent. R. Co., 152 F.Supp. 549 (W.D.Ky. 1957).

654 (S.D.Iowa 1954) plaintiff pleaded a cause of action based on the Federal Employers' Liability Act and joined with it several claims based on breach of contract. The court held that the claims were "separate and independent" and the entire case was removable under §1441(c). The court there seemed to adopt the waiver rationale of the older cases cited above:

> ". . . It rested with (plaintiff) whether he should state a cause solely under the Act and therefor not removable, or unite it with causes of action which might be removed. When he adopted the latter course, defendant then became entitled to exercise the right of removal conferred upon it by the statutes as to the causes of action properly removable. . . ." Id. at 657.

The commentators have spoken to the problem with something less than unanimity. Professor Moore in speaking of the non-removal provision of the Jones Act has said:

> "Finally, there is one situation where a literal application of the removal statute would effect the removal of a Jones Act claim. Under the provisions of §1441(c) where there is a removable separate and independent claim joined with the nonremovable Jones Act claim, the entire suit can be removed . . ." (citing *Emery*) 1A Moore, Federal Practice ¶ 0.167 [3.2]

Professor Cohen has taken a different view:

> "Thus, it is possible, in a case where two parties are of diverse citizenship to encounter the joinder of an unremovable claim with a totally disconnected claim which would otherwise be removable. Assuming that the non-removable claim is sufficiently substantial to pass muster under the fraudulent joinder rules, the combined force of the policies generally precluding removal of the unremovable claim and those permitting joinder argue for leaving the entire litigation in the state court." Cohen, Problems in the Removal of a "Separate and Independent Claim or Cause of Action," 46 Minn.L.Rev. 1 (1961).

I find the waiver rationale of the *Emery* case unpersuasive.[9] It assumes its own conclusion. The real question is whether Section 22 of the Securities Act and §1441 reflect a congressional intent to give a claimant under the Securities Act his choice of forum even though he joins a separate and independent claim. If Congress did so intend, a Securities Act plaintiff cannot be said to have waived his right to such a joinder.

9 While there is authority for the proposition that an F.E.L.A. plaintiff may waive his right to a state forum by his failure to move for remand in the federal court, Bailey v. Texas Co., 47 F 2d 153 (2nd Cir. 1931); Jacobson v. Chicago, M. St. P. & P. Ry. Co., 66 F.2d 688 (8th Cir. 1933); Woodward v. D. H. Overmeyer Co., 428 F.2d 880 (2nd Cir)., cert. denied, 400 U.S. 993, 91 S.Ct. 460, 27 L.Ed.2d 441 (1970), such a waiver should be clearly distinguished from a waiver predicated upon the joinder of claims in the state court.

Neither do I find, as Professor Cohen suggests, that the policies underlying Section 22(a) and §1441(c) clearly dictate an answer. Section 22(a) reflects a congressional solicitude for Securities Act claimants and grants them their choice of forum for litigating their claims. Conflicting with this policy is the apparent twofold purpose of §1441(c): (a) to assure that a defendant entitled to a federal forum for the litigation of a federal claim or a claim by a citizen of a different state will not be deprived of that right by his adversary's joinder of a non-removable, separate and independent claim and (b) at the same time to assure that all claims which should be litigated together for reasons of judicial economy be litigated in the same forum. Because of this conflict, the problem resolves itself into drawing a line where Congress intended the right granted a Securities Act claimant to cease and the protection granted defendants to commence. Congress could reasonably have drawn the line either to include or to exclude this type of case from the removable class.

The answer I believe is to be found in an analysis of §1441.[10] This statute contains two grants of removal jurisdiction. Subsection (a) grants the general right of removal to defendants in any case that could originally have been brought in a district court of the United

10 §1441:

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

States. The first clause of that subsection limits this authority to cases where a contrary result has not been "otherwise expressly provided by Act of Congress." This is a clear reference to statutes like Section 22(a). Subsection (b) further limits this general removal jurisdiction in diversity cases to cases where no defendant is a resident.[11]

Subsections (a) and (c) "refer to two completely different situations." Port of New York Authority v. Eastern Air Lines, Inc., 259 F.Supp. 142, 145 (E.D.N.Y. 1966). Subsection (c) grants additional removal jurisdiction in a class of cases which would not otherwise be removable under the prior grant of authority. It assumes the existence of a separate and independent claim which would not be removable under that prior grant. A literal reading of Section 1441 demonstrates that Subsection (c) is not subject to the restriction contained in the first clause of Subsection (a). Moreover,

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(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

11 Because Subsection (b) is a limitation on the grant of authority contained in Subsection (a) and not a separate grant of authority, the absence of an "except as otherwise provided" claim in Subsection (b) is not significant for present purposes.

nothing in the language of Subsection (c) suggests a Congressional distinction between two classes of suits "otherwise non-removable" within the contemplation of that subsection, i.e., those non-removable because they fall completely without the original jurisdiction of the federal district courts and those which, although dealing with federal questions, are made non-removable by Congressional pronouncement.

I, accordingly, conclude that Section 22(a) restricts the grant of general removal jurisdiction found in Subsection (a). However, in a case where a separate and independent claim, which would be removable if sued upon alone, is joined with one or more otherwise removable claims, whether made non-removable by Section 22(a) or otherwise, Subsection (c) is the governing provision and authorizes removal of the entire case.

III. THE VALIDITY OF THE SEQUESTRATION

The motions to quash the sequestration assert two arguments common to both: (1) Gregg owned no sequesterable interest in the stock at the time of sequestration and (2) Delaware's sequestration statute as here applied is violative of the Due Process Clause of the United States Constitution.

Gregg executed a $1,500,000 demand note in favor of the Bank on December 28, 1971. The note reflected that the USI stock involved was pledged to secure this indebtedness and gave the Bank the right, among other things, (1) to pledge or transfer the note and collateral

to any other pledgee, (2) to transfer all of the collateral to its own name or to the name of its nominee, (3) to vote the stock, (4) to direct that any dividend payments on the stock be made to it, (5) to "demand, sue for, collect or make any compromise or settlement it deems desirable with reference to the collateral," (6) to take control of any proceeds of the collateral and (7) to exercise the "remedies" of a secured party under the Uniform Commercial Code, if the Bank "deemed itself insecure or upon the occurrence of any default."

The sequestration order was served upon USI on or about June 19, 1972. The stock was then registered in the name of Gregg. As of July 27, 1972, the collateral was valued by the Bank at $2,066,333.62.

The loan transaction was negotiated and closed in Florida. The law of Florida determines the nature and extent of Gregg's interest, if any, in the stock.[12] The law of Delaware controls the question of whether any such interest may be sequestered under 10 Del.C. §366. Cheff v. Athlone Industries, Inc., 233 A.2d 170 (Del.Sup.Ct. 1967); Nickson v. Filtrol Corporation, 265 A.2d 425 (Del.Ch. 1970).

An examination of Florida law reveals that Gregg had not transferred his entire interest in the stock to the Bank at the time of sequestration. The rights retained under Article 9 of Florida's Uniform Commercial

12 The relevant portions of Florida's version of the Uniform Commercial Code do not, however, differ from those of the Delaware version.

Code by a debtor who has conveyed a security interest in collateral apply "whether title to collateral is in the secured party or in the debtor." 19C Fla.Stat.Ann. §679.9-202 (West 1966). These rights include the right of return of the collateral upon fulfillment of the debtor's obligations. *Id.* §679.9-506. This right is expressly recognized in the Gregg note; it is, in any event, unwaivable. *Id.* §679.9-501.

The rights reserved to the debtor under Article 9 are rights in the collateral itself and may be transferred voluntarily or involuntarily. *Id.* §679.9-311 provides:

> "The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default."

Stock in a Delaware corporation is personal property having its situs in Delaware. 8 Del.C. §169. Accordingly, interests therein coming within the scope of 10 Del.C. §366 are sequesterable in Delaware for the purpose of compelling the appearance of non-resident defendants. Hodson v. The Hodson Corporation, 32 Del.Ch. 76, 80 A.2d 180 (1951). Somewhat surprisingly there is no reported Delaware case directly ruling on

whether one in Gregg's position has an interest sequesterable under 10 Del.C. §366.[13] I am convinced, however, that a Delaware court confronted with the question would rule in the affirmative.

Section 366 authorizes the Court of Chancery to "compel the appearance of the defendant by the seizure of all or any part of his property." The word "property" as here used has "a broad and comprehensive meaning, including legal and equitable interest in both real and personal property," and is not limited to property interests seizable by foreign attachment at law. Blumenthal v. Blumenthal, 28 Del.Ch. 1, 35 A.2d 831, 836 (1944), aff'd 28 Del.Ch. 448, 59 A.2d 216 (1945); Sands v. Lefcort Realty Corp., 35 Del.Ch. 340, 117 A.2d 365 (1955). With this understanding as a base, Delaware courts, confronted with questions of whether interests in stock were sequesterable, have asked whether the specified interest was cognizable at law or equity, whether it was susceptible of sufficient identification to permit seizure, and whether it was saleable. Blumenthal v. Blumenthal, *supra;* Greene v. Johnston, 34 Del.Ch. 115, 99 A.2d 627 (Sup.Ct. 1953). Here Gregg's interest is so cognizable, so identifiable and so alienable. Accordingly, I conclude that it is sequesterable.[14] Delaware's Uniform Commercial Code con-

13 There have been a number of cases where pledged stock has been sequestered, but in all to which this Court has been referred, the pledgee has apparently been content with modification of the sequestration order in a manner which recognized its senior rights.

14 "Bare legal title" (i.e., registered ownership) is sequesterable, the property being subject to release only upon a showing that its retention or sale would defeat or interfere with equitable interests therein. Rebstock v. Lutz, 39 Del.Ch. 25, 158 A.2d 487 (Sup.Ct. 1960). Equitable interests of limited scope have been held to be sequesterable. In the *Blumenthal* case the plaintiff creditor had alleged that there had been a fraudulent conveyance of stock by the defendant Blumenthal to his sister, Miriam Rogers. The court held:

> ". . . Miriam Rogers is the legal owner of the stock, and Blumenthal has no equitable rights therein, as between them; but it appears that the complainant is a defrauded creditor who stands in a very different position. As between her and Blumenthal, the latter had property rights in the stock, subject to seizure under the statute, which enabled valid substituted service to be had on him. . . ."
> 35 A.2d p. 836.

The fact that an interest is contingent or unmatured does not make it non-sequesterable. Weinress v. Bland, 31 Del.Ch. 269, 71 A.2d 59 (1950).

firms this conclusion. Section 9-311 of Title 5A of the Delaware Code, like its Florida counterpart quoted above, provides that a "debtor's rights in collateral may be . . . involuntarily transferred (by way of sale . . . attachment, levy, garnishment or other judicial process)."[15]

Winitz v. Kline, 288 A.2d 456 (Del.Ch. 1971) does not dictate a contrary conclusion. In that case an order of sequestration had been entered directing the seizure of shares of a Delaware corporation "registered in the name of" the defendant Kline. Prior to the seizure,

15 Section 8-317 of Delaware's Uniform Commercial Code provides that nothing in the Code shall "amend or in any way effect" the provisions of Section 366 and that to the extent that any such provision is inconsistent with Section 366, it shall control. Arguably this might preclude reference to Section 9-311 for the purpose of defining property under Section 366. As the Study Comment on Section 9-311 indicates, however, that Section is a reflection of pre-existing Delaware law.

Kline and the other twenty-nine holders of the corporation's outstanding stock had entered a voting trust agreement. The certificates were surrendered by the five voting trustees to the corporation for cancellation and eight new certificates had been issued in the name of the voting trustees. Under the voting trust agreement the depositing stockholders were issued voting trust certificates. The certificates evidenced the holder's right upon termination of the trust to receive a specified number of "fully paid and nonassessable shares of the capital stock" and his right to "receive payments equal to the cash dividends received by the . . . [trustees] upon a like number of shares of capital stock of . . . [the corporation], less the amount of any expense chargeable to the holder."

The Chancellor noted initially that the case was not identical to earlier Delaware cases which had held that a trustee holds the entire interest in corporate stock constituting the corpus of the trust and that the beneficiaries of the trust, while possessing an equitable interest in the trust, had no interest in the stock itself. *E.g.*, Nickson v. Filtrol Corporation, *supra*. The reason for this observation was a line of Delaware cases which state that a stockholder who deposits his stock in a voting trust retains "beneficial" ownership of the stock for some purposes. Sundlun v. Executive Jet Aviation, Inc., 273 A.2d 282 (Del.Ch. 1970); Clarke Memorial College v. Monaghan Land Co., 257 A.2d 234 (Del.Ch. 1969); Smith v. Biggs Boiler Works Co., 33 Del.Ch. 183, 91 A.2d 193 (1952); Chandler v. Bellanca Aircraft Corporation, 19 Del.Ch. 57, 162 A. 63 (1932). The Chancellor held, nevertheless, that the holders of the voting trust certificates in the case before him did not have a sequesterable interest in the corporate stock held by the trustees as a trust corpus.

Two reasons were cited by the Chancellor for his conclusions: (1) the order directed seizure only of common stock registered in the name of Kline and at the time of the seizure no shares were so registered and (2) any interest which Kline had in the stock was neither capable of effective seizure nor capable of being sold. In connection with the second point the Chancellor pointed out that effective seizure requires that the stock in which the defendant has an interest must be readily identifiable. Greene v. Johnston, 34 Del.Ch. 115, 99 A.2d 627 (Sup.Ct. 1953). He observed that in the case before him any beneficial interest of Kline could not "be related to specific blocks of stock or lots of shares held by the trustees." The Chancellor further found that any such interest could not be sold without disregard of the rights of third parties in the voting trust. In this connection he pointed out that while the interest evidenced by the voting trust certificates might be effectively transferred, seized and sold, the sequestration had been directed to the corporate shares and not to the voting trust certificates.

None of the deficiencies present in the *Winitz* case are present here. The sequestration order directed the seizure of shares held in the name of Gregg and shares held in the name of Gregg were seized. As indicated above, Gregg has an interest in all of those identifiable

shares which is expressly made transferable, either voluntarily or involuntarily, by Section 9-311. That interest can be sold without "disregard to the rights" of the Bank.

Both Gregg and the Bank attack Delaware's sequestration statute as here applied on constitutional grounds. Gregg's attack is two-pronged. First he asserts that the sequestration of property of a non-resident defendant in a case having no substantial contact with Delaware violates due process. Additionally both Gregg and the Bank assert that the sequestration of property without prior notice and an opportunity to be heard violates due process.

Delaware's sequestration statute, 10 Del.C. §366, authorizes the Court of Chancery, after the filing in that court of a complaint against a non-resident, to enter an order directing the defendant "to appear by a day certain to be designated." It then provides:

> "The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such

> property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security."[16]

Rule 4(db) of the Rules of the Court of Chancery, Del.C.Ann., which implements the provisions of the sequestration statute provides in part as follows:

> "(db) Service by Publication and Seizure. (1) No order shall be entered under 10 Del.C. §366 unless it appears in the complaint that the defendant or any one or more of the

16 Subsection (c) of Section 366 provides as follows:
"Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchaser in accordance with law."

defendants is a non-resident of the State of Delaware and the application therefor is accompanied by the affidavit of a plaintiff or other credible person stating:

(a) As to each non-resident defendant whose appearance is sought to be compelled, his last known address or a statement that such address is unknown and cannot with due diligence be ascertained.

(b) The following information as to the property of each such defendant sought to be seized:

(1) A reasonable description thereof.

(2) The estimated amount and value thereof.

(3) The nature of the defendant's title or interest therein; and if such title or interest be equitable in nature, the name of the holder of the legal title.

(4) The source of affiant's information as to any of the items as to which the affidavit is made on information and belief.

(5) The reason for the omission of any of the required statements.

(2) Within three business days after the filing of such bond or bonds as may be required or within such other time as the court may fix, the Register shall, in addition to making the required publication, send by registered or certified mail to each defendant whose appearance is sought to be compelled a certified copy of the order and a copy of the pleading asserting the claim.

(3) After the filing of such bond or bonds as may be required by the order, but not later than 10 days after the date of the order of seizure, the sequestrator shall serve a certified copy of the order upon the person, persons or corporation having possession or custody of the property or control of its transfer, and shall seize the property.

* * * * *

(5) The court may in its discretion and subject to statutory requirements dispense with or modify compliance with the requirements of any part of this rule in any cause upon application to it stating the reasons therefor."

Gregg's first argument is based upon International Shoe v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and its progeny. He asserts that "under modern concepts of due process, a court cannot assert

jurisdiction unless either the defendant or the subject matter of the action had at least minimal contacts with the forum."

The "minimal contacts" doctrine to which Gregg refers is not applicable where, as here, the plaintiff invokes the *quasi in rem* jurisdiction of the court. While a contrary view has been urged as the wiser one,[17] the courts have accepted the view of Justice Holmes that the "foundation of jurisdiction is physical power".[18] Just as a court may exercise *in personam* jurisdiction in a suit on a transitory cause of action where the only contact with the forum state is personal service upon the defendant within that state,[19] so also may a court exercise jurisdiction over property within its control regardless of the presence or absence of other contacts with the forum state.[20] Where the court has either of these foundations for the exercise of its power, it may constitutionally proceed, though the absence of substantial contacts with the forum may lead it to decline

17 See e.g., Ehrenzweig, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Non Conveniens, 65 Yale L.Rev. 289 (1956); Carrington, The Modern Utility of Quasi In Rem Jurisdiction, 76 Harv.L.Rev. 303 (1962). These commentators, however, recognize the prevailing view.

18 McDonald v. Mabee, 243 U.S. 90, 91, 37 S.Ct. 343, 61 L.Ed. 608 (1915). See also Goodrich, Conflicts of Law, §73 (1965).

19 E.g., Fauntleroy v. Lum, 210 U.S. 230, 28 S.Ct. 641, 52 L.Ed. 1039 (1908); Restatement, Conflicts of Laws, §§77, 78; Goodrich, Conflict of Laws, §73 (1964).

20 *Cf.* Hanson v. Denckla, 357 U.S. 235, 246, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1957); Beal, Conflicts of Laws, §§106.3, 107.3 (1935); Goodrich, Conflicts of Law, §70 (4th Ed. Scoles 1964).

to do so under the familiar principles underlying the doctrine of *forum non conveniens*[21] and the federal transfer provisions of 28 U.S.C. §1404.

The state of a corporation's domicile may constitutionally provide, as Delaware has done, that the situs of its capital stock is in its home state.[22] Thus, where the stock of a domestic corporation is brought before the court, this provides a sufficient basis for the exercise of its *quasi in rem* jurisdiction even though the defendant may be a non-resident who has had no prior contacts with the forum state. Breech v. Hughes Tool Co., 41 Del.Ch. 128, 189 A.2d 428 (Del.Sup.Ct. 1963); Ownbey v. Morgan, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837 (1920).[23]

Gregg attempts to distinguish the relevant authorities by saying that this is not in reality a *quasi in rem* action. He correctly points out that an avowed purpose of

21 E.g., Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947); General Foods Corp. v. Cryo-Maid, Inc., 41 Del.Ch. 474, 198 A.2d 681 (Del.Sup.Ct. 1964). The cases relied upon by Gregg arise because of the difficulty of applying traditional concepts of *in personam* jurisdiction over individuals in suits against foreign corporations. Even in such cases if the corporation's activities in a state are substantial enough it is ordinarily subject to suit there on causes of action unrelated to the business conducted in the forum state. See e.g., Restatement (Second) Conflict of Laws, §47 (1971).

22 Rogers v. Guaranty Trust Co., 288 U.S. 123, 53 S.Ct. 295, 77 L.Ed. 652 (1932); Jellenik v. Huron Copper Mining Co., 177 U.S. 1, 20 S.Ct. 559, 44 L.Ed. 647 (1899).

23 See note 26 *infra*.

Delaware's sequestration statute is to compel a general appearance and thereby produce a basis for *in personam* jurisdiction. While the statute is concededly designed to produce this result, it does not follow that the action is not one governed by the rules applicable to *quasi in rem* jurisdiction. Unless and until the non-resident defendant elects to enter a general appearance, the power of the court is limited to the application of the property before the court to the plaintiffs' claim.[24]

The second attack on the constitutionality of Delaware's sequestration procedure is grounded on Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). The reliance upon that case is misplaced.

In *Fuentes* the Supreme Court struck down Pennsylvania and Florida replevin statutes under which personal property had been seized without notice or an opportunity to be heard. The court's holding was not, however, as broad as Gregg and the Bank contend. It is significant that the court noted:

> "There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. Bodie v. Connecticut, supra, 401 U.S. 371, at 379, 91 S.Ct. 780, 28 L.Ed.2d 113. These situations, however, must be truly unusual. Only in a few limited situations has this

24 10 Del.C. §366; Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *cf.* Jacobs v. Tenney, 316 F.Supp. 151 (D.Del. 1970); Restatement of Judgments, §34 comment f (1942).

> Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance . . .."

In connection with these observations the Supreme Court cited with approval Ownbey v. Morgan, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837 (1920), describing it as a case which "involved attachment necessary to secure jurisdiction in [a] state court — clearly a most basic and important public interest."[25] In *Ownbey* the Supreme Court rejected a constitutional attack on the exercise of *quasi in rem* jurisdiction based upon the seizure of stock in a Delaware corporation under Delaware's foreign attachment statute.[26] Under that statute, there was no

25 Fuentes v. Shevin, 407 U.S. 67, 91, n. 23, 92 S.Ct. 1983, 1999, 32 L.Ed.2d 556 (June 12, 1972).

26 Although neither the Delaware court nor the United States Supreme Court considered it significant, the *Ownbey* case appears to have been a suit by non-resident plaintiffs against a non-resident defendant arising out of the latter's activities as general manager of a Delaware corporation the activities of which were limited to the States of Colorado and New Mexico. Morgan v. Ownbey, 29 Del. 379, 6 Boyce 379, 100 A. 411 (1916).

pre-seizure notice or hearing. While the opinion in the *Fuentes* case should not be read as endorsing all of the views stated in the *Ownbey* opinion, *Fuentes* does indicate that seizures of the kind made here are constitutionally permissible when the tripartite test set forth there is met.

The Supreme Court's footnote characterization of the attachment in the *Ownbey* case supplies the answer to the initial inquiry of whether the seizure was "directly necessary to secure an important governmental or general public interest." This is not a case like *Fuentes* where the statutes allowed "summary seizure" when "no more than [a] private gain is directly at stake." Fuentes v. Shevin, *supra* at 93, 92 S.Ct. at 2000. As previously noted a state has a legitimate interest in the exercise of judicial jurisdiction with respect to property within its borders. Seizure for the purpose of securing such jurisdiction in a state court, accordingly, serves, in the words of the Supreme Court, "a most basic and important public interest." Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 1999, 32 L.Ed.2d 556, at n. 23. See also Lebowitz v. Forbes Leasing & Finance Corp., 456 F.2d 979 (3rd Cir. 1972).[27]

Was there need for prompt action? Given the nature of the interest served by the seizure, the answer here

27 Gregg and the Bank seek to distinguish *Lebowitz* on the ground that plaintiffs' cause of action there arose in the forum state. Under the rationale of the opinions in *Lebowitz*, *Fuentes* and *Ownbey*, however, this does not appear to be a relevant consideration. Moreover, there are more contacts between this litigation and the State of Delaware than were present in *Ownbey*.

must also be in the affirmative. Notice would afford the defendant an opportunity to defeat the state's interest in securing jurisdiction by the simple expedient of moving or transferring the property.[28] This distinguishes the present case from the situation involved in *Fuentes*. Those in possession of the property seized in *Fuentes* were subject to the *in personam* jurisdiction of the courts of Pennsylvania and Florida respectively and could be compelled to attend a hearing to make a preliminary determination of the rights in the property. The state's power to adjudicate was, accordingly, not in jeopardy. The interest served by the replevin statutes there under attack was the plaintiff's private interest in securing possession of personal property in which they claimed a possessory interest.

Finally, Delaware has kept a "strict control over its monopoly of legitimate force." The court's analysis of the Pennsylvania and Florida statutes on this point is helpful in understanding the purpose of this third requirement. The court observed:

> "The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession;

28 In the case of seizure of stock in a Delaware corporation, the latter would, of course, be the only option available for this purpose.

> and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark."

Here, unlike *Fuentes,* the order effecting the seizure was issued by a state court judge. That judge had been supplied with a complaint and with an affidavit which revealed: (1) that Gregg was a non-resident and accordingly not subject to the *in personam* jurisdiction of the court, (2) that Gregg owned specifically described, alienable property within the State of Delaware, (3) the value of that property and (4) the source of the plaintiffs' information on these subjects. This information provided the basis for a determination that the seizure would be in furtherance of the "important public interest" underlying the sequestration statute and that prompt action would be required.[29]

It may be argued that the defendant's interest might be better protected if the statute or the rule required the issuing court to make a preliminary finding, upon the basis of an ex parte presentation, that the plaintiffs'

29 Under the Delaware practice, a court presented with a motion for the issuance of a sequestration order may also determine from the complaint whether it is "bona fide on its face." Hughes v. Trans World Airlines, Inc., 40 Del.Ch. 552, 185 A.2d 886 (1962), whether the action is of a kind where the exercise of *quasi in rem* jurisdiction is appropriate, Steinberg v. Shields, 38 Del.Ch. 349, 152 A.2d 113 (1959), and whether the value of the property to be seized bears a reasonable relation to the amount of the claim asserted. Trans World Airlines Corp. v. Hughes, 40 Del.Ch. 523, 185 A.2d 762, 765 (1962).

case has some merit.[30] However, as the Supreme Court noted in *Fuentes,* the protection offered by such an ex parte determination is largely illusory. Fuentes v. Shevin, *supra,* 407 U.S. 67, at 80-82, 92 S.Ct. 1983, at 1994. I do not believe such a procedure is constitutionally required where, as here, the required presentation reveals to the issuing judge a situation where immediate seizure will serve a legitimate state interest.[31]

In short, this is not a situation where the State of Delaware has abdicated "effective state control over state power . . . [to] private parties serving their own private advantage . . .". Fuentes v. Shevin, *supra,* at 93, 92 S.Ct. at 2001. The procedure here attacked serves a public purpose as part of the ordered system of conflict resolution which includes the exercise of judicial power over property located within the state. Lebowitz v. Forbes Leasing & Finance Corporation, 456 F.2d 979 (3rd Cir. 1972).

30 This is not required under Delaware law. Hughes v. Trans World Airlines, Inc., 40 Del.Ch. 552, 185 A.2d 886 (1962).

31 The distinction between the public interest foundation of the sequestration process and the private interest foundation of the *Fuentes* replevin statutes is reflected in the effect of the respective types of seizure. In *Fuentes* the state procedure had deprived one party of possession and had made it available to another without any determination regarding the merits of the latter's claim. In a sequestration context, the practical effect of the seizure is to immobilize the property and thereby protect the court's jurisdiction. The property may not be applied to the claim of the plaintiff until after there has been notice and an opportunity for the defendant to be heard.

IV. REMAND

Having decided that a separate and independent cause of action, removable under 28 U.S.C. §1441(a) and (b), is stated in Claim 7, that the Court of Chancery had jurisdiction under its Order of Sequestration and, accordingly, that the derivative removal jurisdiction of this Court has been properly invoked, the Court must finally decide whether the claims "otherwise non-removable" ought to remain in this Court or, in the exercise of the discretion granted under 28 U.S.C. §1441(c), ought to be remanded to the state court. Notwithstanding the separate and independent character of the claims asserted, I conclude that the public interest in the efficient administration of justice as well as the convenience of the parties and the witnesses will be best served by the litigation of all claims in one proceeding. See Baltimore Gas & E. Co. v. United States Fidelity & G. Co., 159 F.Supp. 738 (D.Md. 1958).

The motions to remand this case and to vacate the sequestration order are denied. This Court will retain jurisdiction of the entire case and determine all issues raised.

Submit order.